STATE OF MINNESOTA

IN SUPREME COURT

C8-84-1650

ORDER FOR HEARING TO CONSIDER PROPOSED
AMENDMENT TO THE RULES OF PROFESSIONAL CONDUCT

IT IS HEREBY ORDERED that a hearing be had before this Court in the Courtroom of the Minnesota Supreme Court, Minnesota State Capitol, on June 8, 1994 at 9:00 a.m., to consider the petitions of the Minnesota State Bar Association and the Lawyers Professional Responsibility Board to add a new Rule 1.8(k) of the Minnesota Rules of Professional Conduct. Copies of the petitions containing the proposed amendments are annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 245 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before June 3, 1994 and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before June 3, 1994.

Dated: April 21, 1994

BY THE COURT:

A.M. Keith
Chief Justice

LAW OFFICES

PETERSEN, TEWS & SQUIRES

PROFESSIONAL ASSOCIATION

4800 I D S CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402-2208

TELEPHONE (612) 344-1600
FACSIMILE (612) 344-1650

June 2, 1994

Mr. Frederick Grittner
Clerk of the Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55115

Re: Proposed Rule 1.8(K) to the Minnesota Rules of Professional Conduct

Dear Mr. Grittner:

I support the so-called "bright-line" rule regulating the sexual relationships of lawyers and clients; which I understand to embrace the following concept:

Lawyers should not engage in a sexual relationship with a client except (i) where the sexual relationship existed prior to the professional relationship or (ii) the sexual relationship commenced after termination of the professional relationship where:

1. "client" means the individual(s) who makes or directly or indirectly participates (i) in selecting legal counsel or (ii) other decisions affecting the nature of the legal services or substantive matters relating to any such legal services and

2. "professional relationship" means the rendition of legal services (i) by the lawyer with whom the client has established a sexual relationship or (ii) by a member, associate, employee or other person with whom the lawyer has a professional business relationship.

The bright-line rule has the following obvious appeal and advantages:

1. It is clear and not subject to misunderstanding by either the client, the lawyer, her/his firm members, or the persons charged with monitoring compliance or enforcement of the Rules.

2. It reflects the concern of legal profession for vulnerable clients, without requiring clients to plead her/his "vulnerability" or disclose the specific circumstances of sexual relationship.

3. It is gender neutral, not only in literal terms but by practical consequences, since the objective determination of the existence of an inappropriate sexual relationship determines the application of the rule not the likelihood of one gender to more or less frequently report an inappropriate sexual relationship.

4. It will be viewed, by clients and others, that lawyers recognize that the trust and confidence clients place in lawyers is not to be abused.

Please request the justices bear in mind that we are dealing with real clients and actual public perceptions and we should not muddy the issue so as to enable lawyers to engage in inappropriate sexual relationships with clients with indifference or with immunity--we owe our clients and the public a clear statement regarding this matter.

Very truly yours,

PETERSEN, TEWS & SQUIRES
PROFESSIONAL ASSOCIATION

Rodger D. Squires

RDS/llc/2742S

cc: Ms. Marcia Johnson, Lawyers
Professional Responsibility Board

May 20, 1994

Minnesota Supreme Court
c/o Frederick Grittner
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Justices:

I am writing to request that you reject the MSBA and LPRB petitions relating to attorney-client sex. Both proposals are unwarranted ventures into an area where neither this court, nor government in general, properly belong. At bottom, these proposals are designed to prohibit and to punish sex between two consenting adults. I find that frightening, and wonder where this is all leading. I was not present at the MSBA hearings on this issue and am not familiar with the factors driving these proposals. Nonetheless, it would appear that the conflict of interest rules and other provisions of the Rules of Professional Conduct are sufficient to protect clients and to deter attorneys from inappropriate behavior in this area.

Sincerely,

Tomas L. Stafford
718 Arlington Ave. E.
St. Paul, MN 55106

Minnesota Women Lawyers
514 Nicollet Mall, Suite 350B
Minneapolis, MN 55402-1009
(612) 338-3205

May 26, 1994

Frederick Grittner
Supreme Court Administrator
Minnesota Judicial Center
25 Constitution Avenue
Saint Paul, Minnesota 55155

Dear Mr. Grittner:

Please consider this letter a request by Minnesota Women Lawyers, Inc. to make an oral presentation at the Supreme Court's June 8 hearing to consider the petitions for a new Rule 1.8(k) to the Minnesota Rules of Professional Conduct. Carol Chomsky and Susan Rester Miles will appear on behalf of Minnesota Women Lawyers. Professor Chomsky is the President of MWL, and Ms. Miles is MWL's Professional Development Committee Co-Chair and was a member of the MWL Task Force on Lawyer/Client Sexual Relations.

If you have any questions or would like additional information, please call me at 338-3205. Thank you.

Sincerely,

Elizabeth Olson
Executive Director

cc: Carol Chomsky
Susan Rester Miles

Working to enhance the status, influence and effectiveness of women lawyers. ■

June 2, 1994

Frederick K. Grittner
Clerk of Appellate Courts
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

Re: Written Statement for the June 8, 1994 Hearing to consider the Petitions of the MSBA and the Lawyer's Professional Responsibility Board to add a new Rule 1.8(k).

Dear Mr. Grittner:

Enclosed please find for filing 12 copies of the written statement of the Minnesota State Bar Association Public Law Section. We would like this written statement presented to the Court, however, we will not be making an oral presentation at the hearing.

Sincerely,

KIM BUECHEL MESUN
Co-chair MSBA
Public Law Section

(612) 296-8406

mesu.dh6

June 2, 1994

JUN 03 1994

The Honorable Justices of the
Minnesota Supreme Court
245 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

Re: The Petitions of the Minnesota State Bar Association and the Lawyer's Professional Responsibility Board to add a new Rule 1.8(k) to the Minnesota Rules of Professional Conduct

Your Honors:

I am submitting this statement on behalf of the Minnesota State Bar Association Public Law Section. Our section reviewed each of the various proposed rules regarding attorney-client sexual relations, including the two rules currently before this Court. We published each of the proposed rules in our section newsletter and solicited comments about them from our over 1,700 members. Additionally, we had the Public Law Section Ethics Committee review each of the proposed rules and make a recommendation to the Public Law Section Executive Council.

The results of the membership poll and Ethics Committee recommendation were discussed at the January 6, 1994, Executive Council meeting. The responses we received showed divided opinion on the need for a rule banning attorney-client sexual relations. Basically, there were three schools of opinion:

1) There is no evidence of a serious problem in this area and the current professional responsibility rules are sufficient to deal with any problems that do arise.

2) If there is to be a rule, the proposed "per se" rule (currently proposed by the Lawyer's Professional Responsibility Board) is the easier rule to enforce.

3) The "per se" rule is overly broad when considering the actual problem faced. This is especially true in its broad definition of an organizational client (currently proposed Rule 1.8(k)(2)). The Minnesota Women Lawyer's "rebuttable presumption" rule (proposed by the MSBA) meets the perceived need to protect emotionally and financially vulnerable clients without the overreactive severity of the "per se" rule.

At its January meeting the Public Law Section Executive Council voted 5 to 3 to endorse the "rebuttable presumption" rule. This section position was presented to the

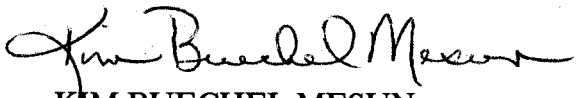
MSBA House of Delegates at its January 29, 1994 meeting. The reasons for supporting the "rebuttable presumption" rule are basically two:

1) Members of the Public Law Section feel that the issue of attorney-client sexual relations is not a big problem, but rather, a reaction to one or two well-publicized incidents and the strong "suggestion" that has been given that if the MSBA and Supreme Court do nothing regarding this subject, the Legislature will. In light of the limited nature of the actual problem, the "per se" rule appears to be a drastic overreaction. The "rebuttable presumption" rule achieves the purpose of responding to perceived public pressure to protect emotionally and financially vulnerable clients without unnecessarily totally dictating the private conduct of lawyers.

2) The definition of an organizational client under the "per se" rule is too broad. For example, for government lawyers this definition could be interpreted to ban relationships with anyone in the county or, for the Attorney General's Office, even the state. The definition contained in the "rebuttable presumption" rule is more limited and more realistic.

The Public Law Section supports the "rebuttable presumption" rule currently proposed by the MSBA and requests that this Court grant the MSBA's petition to include that rule in the Minnesota Rules of Professional Conduct.

Sincerely,



KIM BUECHEL MESUN
Co-chair MSBA
Public Law Section

(612) 296-8406

cc: Public Law Section Officers and Council Members
Roger Stageberg, MSBA President

mesu.dh6

March 22, 1994

Dana Linscott
Route 2, Box 219A
Bemidji, MN, 56601
(218) 854-7428

Ms. Susan Dosal
Supreme Court Administrator
Judicial Center
25 Constitution Ave.
St. Paul, Mn, 55155

Dear Ms. Dosal,

Recently the Minnesota Bar Association and the Lawyers Professional Responsibility Board have proposed new ethical rules regarding sexual relationships between attorneys and their clients, and the Minnesota Supreme Court must now decide if either is to be implemented. Had either of these standards been implemented earlier it would have had a profound effect on my life. Although I understand this rule is not retroactive and will have no effect on my situation, I wish to present my view and personal experience to the court before they make their decision. I am including a synopsis of the circumstances involved, omitting the real names of the participants. Please feel free to contact me if you have any questions or if you will allow me to present my views to the court.

Mark had been my attorney for over 10 years, and I looked to him for all my legal advice. Our relationship became close over the years; we met socially and I considered him a close friend of myself and my new family. My wife May and I had been partners for several years prior to our marriage in a business that involved, among other services, massage. Mark represented us on several occasions, both in and out of court, and regularly advised us regarding our business. He became a regular client , primarily for massage. Mark's wife, Penny, was diagnosed as terminally ill, and as her physical and emotional capacity eroded the stress on him mounted. She became less able to care for herself, their home, and their child. Mark anticipated her death with obvious depression. He began to schedule massage more frequently with May, who later informed me Mark had confided, during a massage, that he felt very frustrated at his wifes' lack of libido. She had confided in him that we were experiencing sexual difficulties as well. Shortly thereafter they began having sexual relations during his massage sessions, and before long they began having strong romantic feelings for each other. They made plans to marry, deciding to wait until his wife succumbed to her illness rather than both go through the process of divorce. Meanwhile, Penny, feeling that her quality of life had declined to a level that was unacceptable, decided to risk the serious surgery involved in the hope that it would either cure or kill her. Miraculously, she survived the surgery and after a year recovered all her capacities. Mark's and my wife's feelings for each other deepened, and our marriage deteriorated. We discussed divorce on several occasions, but each time decided to continue on in the hope we could work out our problems. Eventually, we decided to separate, and began to discuss the particulars of dividing our assets. May moved into a property, which I later discovered was owned by Mark, and soon thereafter he began discussing dissolution with his wife. May and I were able to agree

on the division of our personal assets but could not do so on our business' assets. Mark suggested that we meet with him after hours at his office that he might advise us what our options were. Still unaware of their romantic involvement, I was grateful that he was willing to help us come to an agreement, as I wished our divorce to be amicable. I was aware that our business records were available to Mark, (his partner had been working on franchise documents for us) and felt he could either make a fair determination of our business' worth or refer us to someone who could. I was very surprised when he suggested I should turn all our businesses' assets over to May and even more so when he immediately produced the neccesary documents to do so. I declined even though he assured me that it had no value whatsoever, was heavily in debt to his firm, and was not profitable. I suggested we retain an accountant to audit our records and determine its value, offering to split any such value 50/50. Mark then became angry and advised me that I would likely lose all my personal assets if I insisted on such a split. Mark said he felt I did not deserve to share its value. He again presented the documents to me and forcefully insisted I sign them, and I again refused. I told him I thought he was acting quite unprofessionally and as our attorney had no business intimidating me into making such a major decision. He replied that he did not represent May and myself, he only represented May. This surprised me, as I had believed up to this point he represented both of us. He further advised me that if I left his office without signing the the documents presented, the offer would not be repeated and I would likely lose everything I owned. Despite his threat, I terminated the meeting and left his office.

Several days later, May asked me to pick up the franchise documents that Mark's partner was preparing for us, but when I did so, I discovered they were dissolution papers prepared by Mark instead. What remained of Mays' and my relationship deteriorated over the next several months; it became difficult to maintain a civil working

relationship and our emotional relationship became more and more unstable. May repeatedly attempted to get me to sign various versions of the documents offered to me in Mark's office, but I consistently refused to do so without at least looking through our business' records, which May had hidden. I searched the building in which our office was located and discovered, not one, but three sets of "books" covering the same quarters, but with different figures. I also discovered there had been no cash deposits for over a year in our business account, that the entries' in two sets of "books" did not match the check register, and that May had recently opened at least five new non-joint accounts at several banks under different names, involving at least $80,000 in deposits. I decided to retain legal counsel in preparation for our dissolution.

Retaining counsel in Bemidji proved extremely difficult; few local attorneys would consider assisting me after being told of Marks' personal involvement. Those few who were willing to meet with me either demanded a large cash advance or had close ties to Mark and advised me not to oppose him. I interviewed attorneys unsuccessfully for several weeks, and eventually May confronted me, telling me Mark had advised her that I was looking for a lawyer. She told me that Mark and she were lovers, that they planned to marry, and threatened that if I continued to search for legal representation I would regret it. She repeated Mark's threat that I would not only lose the business but everything else I had if I opposed the settlement offered.

Despite their threats I continued to seek representation as our pending court date drew nearer. I finally found an attorney willing to represent me that had no personal ties to Mark and did not require a retainer that was beyond my means to provide. He confided in me later that he had not at that time believed Mark was having an affair with my wife and several months had passed before he realized his error. Since I did not oppose the dissolution of our marriage, only the disposition of our business' assets , we allowed the action to be bifurcated. The day the dissolution was approved, May

filed an Order For Protection which prohibited me from access to all our business' assets and records and required me to have contact with May and my stepchildren exclusively via Mark. My attorney advised me that although the allegations upon which the OFP was based were bogus, it would not be practical to oppose the Order.

Until my attorney prohibited Mark from having direct contact with me, Mark and I conversed freely and attempted to work out an understanding between ourselves. During one of our early conversations I confronted Mark about his affair with May and its unethical nature. He actually encouraged me to file a complaint with the Professional Responsibility Board, but assured me there were no ethical or legal restrictions on such relationships. To my amazement, when I visited our local law library, I discovered he was correct; there were no legal or ethical restrictions whatsoever on attorney/client sexual relationships. Unlike other professions, it was not illegal for attorneys to have sex with their clients, nor were there any ethical prohibitions. I later discovered that he had in fact developed his relationship with his second wife Penny while representing her in her divorce, and that it was not uncommon for local attorneys to date or marry their divorce clients.

I contacted Mark's wife Penny to enlist her help and discovered that although she was aware of Mark's affair with May, she was unable to cope with the situation while she was still recovering from her operation. When Mark discovered I had been exchanging information with his wife, he contacted me and threatened to hurt me if I continued to do so. May also began to allege that I was violating the OFP on an almost daily basis, and I was arrested and thrown in jail several times based solely on her false allegations. I began to receive harassing telephone calls, late night hangups, and outright threats that if I continued to oppose the settlement offered I would go to jail and lose everything I owned.

May contacted me and suggested she was prepared to negotiate a fair settlement,

and that my attorney should schedule an appointment to do so with Mark. At the end of a full day of "negotiation", Marks' best offer was exactly the same one he had originally proposed, and I owed my attorney $850 more than I had that morning. My attorney felt further negotiations would be a waste of time and money, as he now realized that my original allegations of romantic involvement were probably correct. Soon thereafter I received a call from May . She explained that I could not possibly "win" because she and Mark would simply prolong the process so long that my legal expenses would exceed any settlement I might receive. My attorney said she might be correct. However, since he had not received any business records in response to his interrogatories, he could not be positive. We decided to demand access to the business' records and retain a CPA to audit them and thereby determine the business' worth. In response to our demand, Mark provided a summary of the records but no actual records. This summary was incomplete and inaccurate. Upon contacting several of the recipients of alleged payments, many entries were determined to be fictitious. We again demanded access to the records themselves and received instead a threatening letter from Mark stating that if I persisted he would become more "predatory". He alleged that I had broken into our office in violation of the OFP, had stolen the records, and would be reported and prosecuted if I did not accept their original offer. My attorney advised me that this was a very unethical practice, unlikely to be followed through with. I refused to capitulate.

May renewed her false complaints to the police, claiming that I was threatening to kill Mark and her, was regularly burglarizing our office, and that I had attempted to set it afire. She claimed I was harassing Mark and her, watching and calling them, and that I had tried to kill her. Charges were brought against me, and as my trial drew near my attorney received a letter from Mark offering to drop the charges if I would accept their settlement offer. My attorney was flabbergasted that Mark would actually write out

such an offer, telling me that he had intimated as much before but had not been so blunt. He told me that such a threat was called coercion, was clearly illegal, and that because of the amount involved probably constituted a felony. When I asked if Mark could be prosecuted for coercion he advised me it was unlikely, as the prosecuting attorney would be loath to bring charges against a fellow local attorney. Nevertheless, I went to the police to explore the possibility further and spoke to a senior investigator, who told me the same thing. I still insisted on making a report and he took my statement and told me he would investigate it. He contacted my attorney and the city attorney, and that was the last action taken on the matter. No charges were ever brought, even though I was later given a copy of a letter from the city attorney acknowledging that it was probably felony coercion and therefore should be handled by the county attorneys office.

Under the circumstances I felt I had no choice but to capitulate with their demands. I agreed to assign all our business assets to May. The day the settlement was signed Mark and May asked the prosecuting attorney to drop the charges pending, which he did. I accepted the loss, made arrangements with my attorney to pay his fee as I could afford it, and prepared to go on with my life. However, I soon began to receive harassing telephone calls again. May told me to move away from Bemidji or go to jail, Mark told me to stop cooperating with his wife, and a voice I could not identify told me to "move or die". May began filing false charges against me again, she and Mark (who were now cohabiting openly) petitioned the court for a more restrictive restraining order, and filed an order asking the court to force me to pay a portion of May's alleged attorney fees to Mark. More criminal charges were brought against me when I discovered my eldest stepson attempting to burglarize my home and reported it to the sheriff. The prosecuting attorney offered to plea bargain, but I refused to plead guilty to a crime I did not commit. In the eight months between my being charged and my trial,

May repeatedly contacted me, offering to drop the charges if I would stop cooperating with Mark's wife and move out of the area. I refused. I was then prosecuted, convicted, and sentenced to serve 90 days in jail, with my sentence deferred two years. Soon I received a call from May threatening to bring more charges against me if I did not move out of the Bemidji area. She told me , and my attorney confirmed it, that if convicted again I would most likely spend at least six months in jail. I noticed that when I was in Bemidji, Mark or May would often follow me. Although I reported this behavior to the police, they told me they could do nothing.

I have begun advertising my home of 15 years and all my belongings in the hope of paying a majority of my debts from the business and divorce. I have also begun looking for a job and apartment far away from Bemidji. I now live in fear, and find such a life unacceptable. My life is ruined, constantly overshadowed by the fear of a ruthless attorney and his ability to manipulate the Judicial system. I fully understand that it is not within your powers to help me, but I beg you to prevent this from happening to others. Currently the legal community, which is supposedly self-policing, does not hold itself to the same ethical or legal standards to which it holds other professions where trust is an integral part of the professional relationship. Based on the Bar Association vote on this rule, many attorneys do not wish to be bound by what most would consider normal social mores. Sexual relations can often lead to strong emotions that compel people to do things they would not normally do. Because of their ability to manipulate the judicial system via their standing as officers of the court, attorneys can cause even more harm than the other professionals currently prohibited by law from having sexual relations with clients. Although it would seem only common sense that attorneys should not take advantage of their clients vulnerability, some

attorneys clearly require strong guidance in this area. Possibly strong ethical prohibitions regarding sexual relations with clients will suffice. I personally believe that attorneys should be just as liable for victimizing their clients as are other professionals in Minnesota. And it is not solely their clients that are prone to victimization by attorneys that feel it's acceptable to take advantage of the trust implicit in their professional relationship with clients. This single instance had many victims: I am not alone. Penny is also willing to testify of her multiple victimization but is afraid she cannot be protected from retaliation by Mark.. May is a victim, encouraged by Mark's promises of marriage and the belief that his ability to break the law with impunity extends to her. The citizens of Minnesota who by and large must trust their own attorneys to not act in a predatory manner are victims. And every honest, ethical attorney is a victim as well,as this type of behavior by a few soils the image of the entire profession. And perhaps rightly so, if the unwillingness by Bemidjis' attorneys to police themselves is endemic. I pray it is not.

Sincerely,

Dana Linscott

HAMLINE
UNIVERSITY
SCHOOL OF LAW

Faculty Office

May 25, 1994

Frederick K. Grittner
Clerk of Appellate Courts
245 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Dear Mr. Grittner:

I would like to make an oral presentation at the June 8, 1994 Minnesota Supreme Court Public Hearing on the two petitions to govern sexual relations between lawyers and clients. It is my intention to speak on behalf of a per se ban against sexual relations between attorney and client.

Find enclosed 12 copies of my written statement with attachments.

I would ask that you provide me 10 minutes for my oral presentation. I will not read my written statement but rather make some specific comments related to the written statement.

If you have any questions do not hesitate to contact me. Could you also let me know approximately what time I will be testifying.

Yours truly,

Joseph L. Daly
Professor of Law
(612) 641-2121

JLD/cn

encs.

STATE OF MINNESOTA
IN SUPREME COURT

In Re:	TESTIMONY IN FAVOR OF PER SE RULE BANNING ALL ATTORNEY-CLIENT SEX
Rule Making by Supreme Court on Attorney-Client Sex	by JOSEPH L. DALY
Hearing on June 8, 1994	Professor of Law Hamline University School of Law St. Paul, Minnesota

INTRODUCTION

Attorneys work in the realm of conflict. The professional relationship between attorney and client in the realm of conflict requires both reason and passion. Zealous advocacy involves the intellect and the heart. Sexual involvement between the attorney and the client inevitably leads to stress in the professional relationship and such a relationship has the appearance of impropriety.

Lawyer, shyster, ambulance chaser, manipulator, mouth-piece, parasite upon parasite. We've all heard the lawyer bashing. How do you tell the difference between a dead lawyer and a dead skunk? Skid marks in front of the skunk. "First thing we do, kill all the lawyers," Shakespeare, Henry VI. It seems no one loves a lawyer.

What is it that a lawyer does? Before I deal with this question I want first to talk about doctors. Ultimately, what is it that the doctor does? The doctor operates within the realm of human suffering. The doctor is interested in somehow relieving

physical pain, mental pain, psychological pain so that the patient's life can be more fully lived. No properly trained doctor thinks that death can be stopped. All of us are going to die. Of course life is a value; doctors try to extend it, to assist in its full enjoyment.

And the lawyer? The lawyer operates within the realm of human conflict. Just as the doctor operates within the world of human suffering and understands that human suffering is inevitable because in the end we all die, so the lawyer works within the world of conflict and understands conflict is inevitable because human beings have been created with free will. Humans live in a society - in a social structure in which we need each other. "No man is an island."

Because we have free will and live in a society, conflict is inevitable. Even though we love our spouses, our children, our friends, our significant others, we understand that even love doesn't conquer conflict. Conflict is part of being human.

Lawyers know that in a democracy there will always be conflict. What we lawyers try to do is to create ways to heal that conflict in a positive fashion. Doctors in the end cannot stop death. Lawyers in the end cannot stop conflict. But both can assist each patient/client by carefully honoring the very human relationship which must develop for the professional to do the work properly.

A lawyer acts as both a counselor at law and an advocate on behalf of individual human beings, groups of human beings, social structures, and corporate structures. In the last few years lawyers have begun to reconsider the variety of ways to resolve disputes. The Supreme Court itself has come to recognize that the courthouse can be a place for negotiation, mediation, conciliation, arbitration, fact-finding and other

creative mechanisms for dispute resolution that take into account the human reality of conflict but also the need to avoid the warrior-like mechanisms that have been used so much in the profession of law. See Minnesota General Rules of Practice, Rule 114, Alternative Dispute Resolution, effective July 1, 1994.

Perhaps the lawyer jokes are a wake up call to our profession. If that's the case, I know the profession is hearing the alarm. Obviously, lawyers need to educate the public to understand that conflict is not evil in and of itself. It is simply a reality of the human experience. The best way to deal with conflict is openly, honestly, humanly, with movement toward a positive healing not a negative resolution. Running away from conflict does not work. Eventually the conflict becomes even bigger. Human nature being what it is, there probably will always be a need for lawyers.

So also lawyers must understand that human nature being what it is, any sexual involvement between a client and a lawyer will inevitably generate problems which should never be part of the professional attorney-client relationship.

BACKGROUND

I am a professor of law at Hamline University School of Law, St. Paul, Minnesota. This Spring Term 1994, I taught a seminar on Professional Ethics. As part of the seminar, students presented papers. Two particularly adept students, Paul M. Dadlez and Karen A. Brooks, presented papers on the topic of attorney-client sexual relationships. Mr. Dadlez's paper is entitled "Sex and the Lawyer-Client Relationship in Minnesota - OR - Advice to the Supreme Court of Minnesota: Reject

Both of the Petitions for Rules Governing Lawyer-Client Sexual Relations, Because They Fall Short of Protecting the Public or Maintaining the Integrity of a Wounded Profession." [copy attached]. Ms. Brooks' paper is entitled "Attorney/Client Sexual Relations: What are the Justifications for a New Rule and What Language Should be Used to Proscribe This Conduct?" [copy attached].

The conclusion Mr. Dadlez comes to is:

> The court must remind those who pursue a vocation in law, that it is not just a job, it is a profession and an institution whose integrity must always be preserved. Anything less than an absolute ban would fail to achieve that objective. [Dadlez at 27]

The conclusion Ms. Brooks comes to is:

> Questions posed in the introduction can be answered by the foregoing analysis of the justifications and proposed language of the new rules. It is clear that the language of the LPRB rule sends a clear message that all attorney/client sexual relations are prohibited while the MSBA rule seeks to impose restrictions on the legal profession that prevents the exploitation of women at a time when they are vulnerable. Based on this vulnerability focus, this writer believes the MSBA rule more adequately captures the character of the misconduct. Further, the MSBA rule, although a narrow rule, still gives clients notice as to what conduct they can expect from their lawyers, will deter attorneys from engaging in such behavior, and clarifies the proscribed boundaries of attorney conduct.
>
> Rules seeking to prohibit attorney/client sexual relations when the client is emotionally or financially vulnerable represent part of the paradigm shift granting women greater recognition under the law. With the advent of the women's movement, the law has become more responsive to women's experience, giving the problems women face legal names and reshaping the law accordingly. The law now views sexual harassment, domestic abuse, and most recently stalking, as cultural problems that are defined by the law

> rather than dismissed as individual problems. Certainly, the decision by members of the Minnesota Bar to sanction attorney/client sexual relations is part of this paradigm shift. The Minnesota Bar and a limited number of other jurisdictions now acknowledge that women are emotionally or financially vulnerable in certain legal contexts; thus, the law should represent their interests as members of the public with some specificity. This decision by the State Bar gives women a legal name for the humiliation to which they may have been subjected by the "Arnie Beckers" of the legal profession. Rather than forcing women to file complaints under other provisions that do not directly sanction the conduct a tissue, the rules address this egregious conduct. Moreover, these proposed rules attempt to sanction this conduct without revictimizing women in the process.
>
> More importantly, no matter what rule is adopted by the Minnesota Supreme Court and other state courts considering new rules, the legal profession has clear notice that the conduct will result in discipline. [Brooks at 22-23]

I was also a Work Group member of the Professional Education subcommittee of the Task Force on Sexual Exploitation by Counselors and Therapists in 1985 [see Minnesota Department of Corrections, "Task Force on Sexual Exploitation by Counselors and Therapists" Legislative Report, 1985.] Out of that Legislative Report the Minnesota Legislature adopted both criminal and civil statutes regulating psychiatrists, psychologists, and psychotherapists involving "Wrongful Sexual Contact" between patient and therapist. I also wrote a law review article addressing the question of sexual exploitation of the mentally ill. See J. Daly, "The Diverse Goals Involved in the Treatment of the Mentally Ill: Is a Collision Inevitable?" 8 J. Legal Medicine 49 (1987); [pertinent part of article pp. 82-87 attached "Sexual Exploitation of the Mentally Ill."] I practiced law from 1969-1974 and continue to represent clients

through the Hamline General Practice Clinic.

ANALYSIS

It is my considered opinion that because of the nature of the attorney-client relationship a per se ban on sex between attorney and client should be instituted. The original MSBA rule should be adopted. The Minnesota Women Lawyers proposed rule, (now supported by the Minnesota Bar Association) based on the House of Delegates vote in January 1994, should be rejected. Why? Just as any human being would prefer to live a healthy life and avoid seeing a physician, so also a free willed human being would prefer living a conflict free life and avoid seeing a lawyer. However, neither is the reality of the human experience. We see a doctor when we are suffering. We don't know what to do or what ails us. Therefore, we seek his/her advice. In many ways as a patient, we are in the same relationship as a child is to a parent. The doctor through education, experience and profession advises, assists and consoles us. It is the same in the lawyer-client relationship. The only reason we go to an attorney is to assist us in resolving or avoiding conflict. If we knew how to do it ourselves, we would. But in our complex society the knowledge, experience and understanding of the attorney is worth the money we pay. But we are by the nature of the relationship in a less powerful position as a client. We are in a similar relationship that we would be with our parents. The nature of the lawyer/client professional relationship is paternalistic/maternalistic.

Therapists are taught about the concept of "transference."

> At the heart of the debates surrounding professional-client sexual relationship and how it defines the fiduciary

> role is the phenomenon of transference and its effects on the human psyche. Transference is defined as, "[t]he process in and by which an individual's feelings, thoughts, and wishes shift from one person to another...with the analyst made the object of the shift." Transference emotions are overwhelming and unconsciously motivated feelings toward an attorney by the client that evokes past feelings and attitudes felt toward other important persons of authority, such as care providers or parents. The goal of the psychoanalyst is to achieve transference of those feelings by the patient to the therapist.
>
> Similarities between the patient-therapist relationship and the attorney-client relationship are many in number. Therein lies the hazard, because transference is the product of any relationship involving trust, regardless of whether a fiduciary seeks to achieve transference or not. Introducing sexual contact into the relationship creates an environment of incest. A client manifests the same feelings that one would have as a result of sex with a parent: shame, guild, and anxiety. This grave potentiality should not be left to chance. [Dadlez at 14-15 (footnotes omitted)]

Psychology also teaches about the concept of "countertransference."

> The concept of countertransference raises concerns regarding the attorney's ability to maintain independent professional judgment. Countertransference is the counselor's conscious or unconscious emotional response to the person being counseled. In effect, the professional subconsciously "buys in" to the transference taking place through countertransference and embraces the parental role. The counselor who acts upon those feelings is equally indulging in unrealistic affection. Further, it is the counselor who is in a better position to understand this fact, either through his specialized training in the phenomena of transference and countertransference or because he realizes that he is in the superior power position as fiduciary. [Dadlez at 16 (footnotes omitted)]

Therefore, because of the paternal/maternal bases of the attorney-client relationship and the psychological concepts of transference and countertransference a

per se rule banning sexual relationships between the attorney and the client should be instituted.

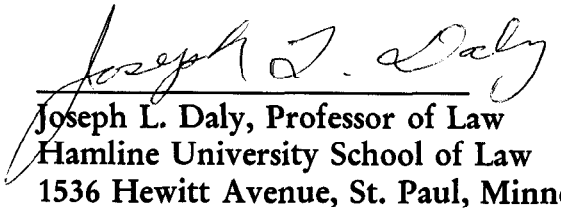
A per se ban on sexual relationships between attorney-client would not violate the rights to privacy or association. The State has the authority to regulate certain sexual behavior among adults. There is not an unlimited right to privacy. There is a rational relationship between the State's interests in protecting the mental wellness of its citizens, maintaining standards of conduct to protect the population from unscrupulous and/or incompetent attorneys and a rule that prohibits sexual relationships absolutely within the context of an attorney-client relationship designed to meet those aims. See, Dadlez at 20.

Permitting attorney-client sexual relationships will negatively impact on the integrity and appearance of propriety of the legal profession. A per se rule banning sex between attorney and client will only help in ending the distrust and animosity that many in society seem to have toward lawyers. As my student, Paul Dadlez, said in his paper at 24 "A failure by the legal profession to respond to a public perception that has such grave social implications, threatening trust in society's institutions would be wholly irresponsible. Fostering public faith in society's institutions is clearly a compelling state interest."

CONCLUSION

Based on the foregoing analysis, I respectfully petition the Supreme Court of Minnesota to adopt a per se rule banning sexual involvement between attorney and client.

Respectfully submitted by,



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SEX AND THE LAWYER-CLIENT RELATIONSHIP IN MINNESOTA
-OR-
ADVICE TO THE SUPREME COURT OF MINNESOTA: REJECT BOTH OF THE PETITIONS FOR RULES GOVERNING LAWYER-CLIENT SEXUAL RELATIONS, BECAUSE THEY FALL SHORT OF PROTECTING THE PUBLIC OR MAINTAINING THE INTEGRITY OF A WOUNDED PROFESSION

Paul M. Dadlez
Seminar on Ethics
Prof. Joseph Daly
May 9, 1994

INTRODUCTION

In our society when someone embarks on a vocation in the professions, she faces the continuing question of what being a member of a profession means. With this in mind, "professionals" find themselves striving constantly to comport to the professional standard required of them. To do otherwise is a breach of that standard and places the professional at risk of being ostracized or singled out for conducting herself in an unprofessional manner. Our society considers law a profession. Therefore, someone who pursues the calling to this profession must understand the role he assumes in order to be able to call himself a professional.

The quest for understanding what is required of someone who seeks to be a "professional" has been defined as an ominous and lifelong undertaking:

> "For to become and to be a professional, such as a lawyer, is to incorporate within oneself ways of behaving and ways of thinking that shape the whole person. It is especially hard, if not impossible, because of the nature of the professions, for one's professional way of thinking not to dominate one's entire adult life...The nature of the professions--the lengthy educational preparation, the prestige and economic rewards, and the concomitant enhanced self--makes the role of professional a difficult one to shed even in those obvious situations in which that role is neither required nor appropriate. In important respects, one's professional role becomes and is one's dominant role, so that for many persons at least they become their professional being. This is at a minimum a heavy price to pay for the professions as we know them in our culture, and especially so for lawyers. Whether it is an inevitable price is, I think, an open question, largely because the problem has not begun to be fully perceived as such by the professionals in general, the legal profession in particular or by the educational institutions that train

professionals.[1]

In other words, for one to truly be a professional means he must wear a cloak of professionalism from which he can never truly undress.

One of the objectives of this comment is to analyze how lawyers' professional behavior can have a positive or negative impact on the general public's image of the profession and to recognize that in most cases, it is the profession's responsibility to control lawyers' "professional" behavior.

The legal profession is suffering from an increasingly negative public image. More and more of this country's population would like to see far fewer lawyers and tighter scrutiny of the profession. This groundswell has evoked a peculiar response within the legal community. The legal community's reaction is analogous to that of an ostrich burying its head in the ground, hoping to be passed unnoticed. Or, it is equally analogous to an alcoholic who has been confronted by his loved ones. The profession has taken on the characteristics of denial and by its own ignorance has played a part in its ever increasing negative public image.

An issue that has been ignored by the legal community and even glamorized by the media is that of the sexual relationship between a lawyer and the client he represents. It has been said that all professions face the problem of sexual involvement between the

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[1] James E. Moliterno and John M. Levy, Ethics of the Lawyer's Work, at 49 (West, 1993). Citing, Richard Wasserstrom, Lawyers As Professional: Some Moral Issues, 5 Hum. Rts. 1, 15 (1975).

professional and client.[2] The legal profession is not immune to this dilemma.[3] A drafter of the American Bar Association Model Code of Professional Responsibility suggests that the Bar has discussed the issue in a soft spoken manner for well over a generation.[4] It has been called the legal profession's "dirty little secret".[5] A recent survey indicates that the recorded rate of disciplinary proceedings fall short of detecting the true frequency of attorney-client sexual relations.[6] This is a problem that, if left unaddressed by the profession, could further impair the already damaged reputation of the profession and ultimately result in public outrage.[7]

Minnesota, like many other states, has relied on existing rules of conduct to regulate relationships between lawyers and their clients. Specifically it has looked to rules generally

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[2] Dan S. Murrell, J.L. Bernard, Lisa K. Coleman, Deborah L. O'Laughlin and Robert B. Gaia, Loose Canons - A National Survey of Attorney-Client Sexual Involvement: Are There Ethical Concerns?, 23 Mem. St. U. L. Rev. 483 (1993). (Hereinafter, Murrell, et al., Loose Canons.)

[3] Id.

[4] Marvin H.Firestone and Robert I. Simon, Intimacy Versus Advocacy: Attorney-Client Sex, 27 Tort & Ins. L.J. 679. (From Westlaw at 6.) (Paraphrasing Geoffrey Hazard.) (Hereinafter, Firestone and Simon, Intimacy Versus Advocacy)

[5] Linda Mabus Jorgenson and Pamela K. Sutherland, Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact, 45 Ark. L. Rev. 459, 470 (1992).

[6] Murrell, et al., Loose Canons, supra note 2 at 486.

[7] Comment, Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?, 40 UCLA L. Rev. 1275, 1278 (1993).

governing conflicts of interest between lawyer and client to address the problem.[8] Currently, only two states, California and Oregon, have ethics rules specifically prohibiting sexual relationships with clients either in part or absolutely. [9]

In an effort to prevent the legislature from imposing a law upon the Bar, the Minnesota State Bar Association (MSBA) and the Lawyers Professional Responsibility Board (LPRB) have taken up the issue and proposed competing ethics rules. Both have petitioned the Minnesota Supreme Court to adopt their respective rule.[10]

This comment will explore the nature of the professional-client relationship in general and the lawyer-client relationship in specific to explain how a sexual relations plus legal representation add up to potentially grave consequences for the client, and ultimately the legal profession. The premise is that, in Minnesota sexual relations should be prohibited in the lawyer-client relationship absolutely with few exceptions, because the risks are too great. Both the MSBA and LPRB rules proposed are toothless beasts which fall short of alleviating those risks, and could harm an already troubling situation, as it fuels a public

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[8] See, Minnesota Rules of Professional Conduct, Rule 1.8, (1994).

[9] Donna Halvorsen, Ban Urged on Lawyer-Client Relationships: Progressive Rule Aims to Protect Vulnerable, Minneapolis Star-Tribune, January 30, 1994 at 1B. (Hereinafter, Halvorsen, Ban Urged on Lawyer-Client Relationships).

[10] See, Petitions of MSBA and LPRB to amend the Rules of Professional Conduct to add new Rule 1.8(k). The proposals are dated March 10, 1994 and March 28, 1994 respectively. (Hereinafter MSBA petition and LPRB petition.)

perception that the profession is too eager to regulate strictly all other facets of society except its own conduct.

The MSBA proposal is a consensus resulting from a debate before its House of Delegates which was presented with two competing proposals.[11] The resolution adopting the version of the rule outlined in the petition to the Supreme Court of Minnesota was approved on January 29, 1994 and was adopted by a vote of 110 in favor and 61 against.[12] Basically, the MSBA rule proposed that sexual relationships with an existing client are prohibited when the client is emotionally or financially vulnerable or if continued representation would impair the lawyer's or client's independent judgment.[13]

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[11] See, MSBA Petition, supra note 10.

[12] Halvorsen, Ban Urged on Lawyer-Client Relationships, supra note 9 at 1B.

[13] MSBA Proposed Rule 1.8(k)

1. A lawyer shall not:

(A) Have sexual relations with a current client in situations in which the client is emotionally or financially vulnerable; or

(B) Represent a client or continue representing a client with whom the lawyer has engaged in sexual relations if the lawyer's or the client's independent judgement is likely to be impaired thereby.

(2) For the purposes of this paragraph:

(A) Sexual relations means sexual intercourse or any other intentional touching of the intimate parts of the lawyer.

(B) If the client is an organization, any individual who oversees and has decision-making authority regarding the representation shall be deemed to be the client.

(C) This rule does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal

The LPRB's proposed rule places a more stringent ban on sexual relations between lawyers and clients.[14] The LPRB's rule does not

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work of the client.

(3) In any disciplinary proceedings involving an alleged violation of thee rules, a lawyer who engages in sexual relations with a client will be presumed to violate Rule 1.8(k) paragraph (1)(B). A lawyer who engages in sexual relations with a client shall have both the burden of production and the burden of persuasion that Rule 1.8(k) paragraph (1)(B) is not violated.

(4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

(5) Rule 1.8(k) shall not apply to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

[14] LPRB Proposed Rule 1.8(k)

A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced or after it ended. For purposes of this paragraph:

(1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

(2) If the individual client is an organization, any individual who oversees the representation and gives instructions on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with other employees of the entity they represent.

(3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work of the client.

(4) If a party other than the client alleges a violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation

limit the proscription on sexual relationships to the emotional or financial vulnerability of the client.[15] Both rules allow sexual relationships to continue during representation for those whose relationship pre-date the representation.[16] It is the belief of the LPRB that the MSBA's proposed rule, if adopted, would result in the re-victimization of clients, because the disciplinary proceeding is focused on the client who must show that he was vulnerable.[17]

A more stringent rule than either proposal before the Court must be adopted. The nature of fiduciary relationships, in this specific context lawyer-client relationships, is that they are based on trust. Thus, violation of this trust vis a vis sexual contact is so detrimental to the role lawyers play in our society as professionals that nothing less than a strict, absolute ban on such conduct is required.

The thesis of this comment is that lawyer-client sexual relationships have been, are, and will continue to be a violation of the standards of professional ethics regardless of whether or not they are presently proscribed by the Rules of Conduct. Due to the very nature of the professional relationship with the client.

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and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

[15]. Id.

[16] See, MSBA Proposed Rule, supra note 13. See also, LPRB Proposed Rule, supra note 14.

[17] See, LPRB Proposed Rule, supra note 4.

The current Conflict of Interest rules under the Rules of Professional Conduct used to address the problem presently, send too weak a message to members of the profession to steer clear of such relationships in the course of representation. The unwillingness of some members of the Bar to consider adopting a specific rule of conduct expressly proscribing sexual relationships between lawyers and their clients, makes it clear that the time has come for the Court to send a clear message to members of the Bar that such behavior is inherently unethical. The Court must make it clear that if an attorney engages in a sexual relationship with a client then representation must cease or the attorney will face discipline.

This comment will explain the importance of the fiducial role lawyers undertake, and how the phenomenon of transference impacts the relationship, making volitional consent by the client a near impossibility. This comment will also discuss why such behavior impairs the profession's already damaged reputation and will explain why the proposals before the Court, though well intentioned, are inadequate to address the problem. Therefore, the court must adopt and enforce a strict rule of conduct.

I. The Counselor as Fiduciary

By definition a fiduciary is, "a person having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking...; in the nature of a trust... founded upon trust or confidence."[18] Examples of

[18] Black's Law Dictionary, 626 (Sixth ed. 1990).

fiduciary relationships abound in our society. A parent comforting a frightened child. A pediatrician counseling the hysterical new parent. A teacher educating an eager student. Further, a cleric absolving the forgiveness seeking parishioner. Still further, an attorney counseling a confused businessperson on legal issues that effect his livelihood. These are just a few examples of fiduciary relationships that permeate our society.

Recently, our society has been witness to the potential for abuse of the fiduciary relationship. We hear stories of child abuse by parents. Churches face accusations of sexual abuse of church members by clerics. As a society, we find the examples of the abuse of the fiduciary relationship particularly troubling because we are aware that by its very nature, the fiduciary relationship is one which is not based on equality in terms of power. "A fiduciary relationship exists when two parties are in unequal bargaining positions due to one party's dependence on and trust in the other's knowledge and power."[19] The idea that the fiduciary would exploit the party who invests trust and confidence in him by exerting his superior power to pursue his self interests at the expense of his client's interests is particularly troubling.

The standard of conduct that the client expects of the attorney as fiduciary may be summarized thusly, "[t]he trust inherent in the role of lawyer creates the expectation that whatever confidences the client has vouchsafed to the lawyer will

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[19] Simon and Firestone, Intimacy Versus Advocacy, supra note 4 at 5.

be solely used to advance the client's interest, and will not be used to the attorney's advantage, sexual or otherwise."[20] Thus, the attorney as fiduciary is not immune to this core issue of the fiducial relationship.[21] Under this standard of conduct it is arguable that initiation of sexual behavior in the course of representation is always wrong, regardless of which party initiates the behavior, and that consent can never be true, volitional, or uncoerced.[22]

The investment of trust and confidence in the attorney is understandable. While the lawyer has considerable training and experience in matters relating to the law, the client does not.[23] Law can be intimidating, abstract, rooted in formality, and adversarial in nature. Often, when someone is confronted with the need to seek legal assistance he is doing so for the first time. The process of finding the right attorney can be intimidating. When shopping for an attorney the client is subjected to scrutiny by having to divulge personal information to get an evaluation as to whether or not there is a need for representation. At the same time, the client may similarly scrutinize the attorney's qualifications to represent. However, the decision to hire a

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[20] Anthony E. Davis and Judith Grimaldi, Sexual Confusion: Attorney-Client Sex and The Need For a Clear Ethical Rule, 7 Notre Dame J.L. Ethics & Pub Pol'y 57 (1993). (From Westlaw at 2). (Hereinafter, Davis and Grimaldi, Sexual Confusion).

[21] Id. at 1.

[22] Id.

[23] Davis and Grimaldi, Sexual Confusion, supra note 20 at 4.

particular attorney is usually based on instincts and value judgements the client takes from an initial and relatively brief consultation. Lawyers are trained to scrutinize facts and assess potential clients in order to determine the merits of a case. Clients receive no training on how to shop for an attorney.

The legal profession enjoys a virtual monopoly representing individuals and entities within our judicial system. Much of the trust invested in attorneys by clients is rooted in the elevated status society places upon the profession, partly because lawyers have education and training, but also because the profession has such a strong role in our system of justice. Thus, in the course of representation, it is easy to see why clients become increasingly dependent on their attorneys.[24] Some factors that make clients dependent on their attorneys include:

> "...the client's expectation that the lawyer will 'step in and straighten things out'; the client's attempt to avoid responsibility for making a decision; the client's 'magical expectation'...that the lawyer is able to accomplish any manipulation or transaction which the client desires; the client's inflated view of the legal profession; the client's low self-esteem; and finally, the attorney's psychological need to occupy a dominant role in the interaction."[25]

In other words, the client willingly places himself in the attorney's hands because the attorney personifies the institution and the power of law. Lawyers willingly except this role.[26]

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[24] Firestone and Simon, Intimacy Versus Advocacy, supra note 4 at 6.

[25] Id. at 6,7.

[26] Davis and Grimaldi, Sexual Confusion, supra note 18 at 4.

Therefore, those who argue that the client's consent to engage in sex justifies the conduct, believing it is not a breach of fiduciary responsibility, are irresponsible for their failure or refusal to understand the degree of power they possess and what it means to be a fiduciary.

II. THE LAWYER'S IMPAIRED JUDGMENT AND THE OVERLY ZEALOUS ADVOCATE

A major part of the lawyer's responsibility to his client is to maintain independent professional judgment in the course of representation.[27] Sexual activity during the course of representation may cloud the lawyer's ability to make independent decisions about the case.[28] The potential consequence of the impaired judgment is injury to the clients legal interests.[29] A recent survey of attorneys who have admitted having sex with a client indicated that it causes problems in the professional relationship.[30]

The example provided in most of the scholarship are incidents of family lawyers being less likely to promote reconciliation

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[27] Note, Attorneys, Clients, and Sex: Conflicting Interests in the California Rule, 5 Geo. J. Legal Ethics 649, 650 (1992). (Hereinafter, Note, Attorneys, Clients, and Sex). Comment, Professional-Client Sex, supra note 6 at 1310. Davis and Grimaldi, Sexual Confusion, supra note 20 at 1.

[28]. Id. at 655. Linda Mabus Jorgenson and Pamela K. Sutherland, Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact, 45 Ark. L. Rev. 459, 474 n. 41 (1992).

[29] Id.

[30] Murrell, et al., Loose Canons, supra note 2 at 489.

between divorcing parties. [31] However, the potential for independent judgment impairment must not be perceived as exclusive to the domestic relations arena.

It is plausible that impaired judgment may occur in the sexual relationship that predates and continues during representation. For example, an attorney is asked by her spouse to handle a sexual harassment claim involving the spouse. It is reasonable to assume that an attorney would be blinded by the emotional bond between spouses to the point of hyper zealousness that may impair the attorney's ability to rationally view the facts and competently represent her client/spouse.[32] It is also plausible that attorneys who work in the commercial or corporate setting could also be affected by impaired judgment. For example, what about the president of a corporation who is the client of a large firm. Suppose that he is an extremely valued and influential client but he is also lecherous when it comes to matters of the heart or bedroom. Suppose that he uses his elevated status to seduce or

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[31] See generally, Murrell, et al., Looses Canons, supra note 2. Firestone and Simon, Intimacy Versus Advocacy, supra note 4. Comment, Professional-Client Sex, supra note 6. Davis and Grimaldi, Sexual Confusion, supra note 20. Note, Attorneys, Clients, and Sex, supra note 27.

[32] This hypothetical is a direct result of discussions during a meeting on March 15, 1994 between this commentator and Professor Joseph L. Daly of Hamline University School of Law. Professor Daly gave an example of a hypothetical lawyer whose spouse was being taken advantage of in an employment matter that resulted in the lawyer's hyper zealous representation, and at the conclusion of the representation the lawyer admitted to being carried away emotionally simply because of the relationship status he had with the client who also happened to be a his spouse. Any resemblance of this example to an actual case is purely coincidental.

coerce an unsuspecting attorney into sexual relations. This attorney could be a man or a women, a partner or an associate, it does not matter. The more powerful individual convinces the attorney to engage in sex or the client will either discredit the attorney with his partners or employers, maybe even take his business elsewhere.[33]

An absolute ban on sex between lawyers and clients would provide married attorneys and attorneys dealing with powerful clients the opportunity to use their legal duty to abstain from these relations as a shield against the illustrated hazards. Granted, such a ban would not protect attorneys from the lecherous client entirely but it does illustrate that the problems are not entirely limited to the domestic relations arena.

III. TRANSFERENCE, COUNTERTRANSFERENCE AND THEIR IMPACT ON THE FIDUCIARY ROLE

At the heart of the debate surrounding professional-client sexual relationships and how it defines the fiduciary role is the phenomenon of transference and its effects on the human psyche.[34] Transference is defined as, "[t]he process in and by which an individual's feelings, thoughts, and wishes shift from one person

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[33] This hypothetical is a result of a Seminar on Ethics lecture on March 21, 1994 conducted by Kenneth Jorgenson, Deputy Administrator, Minnesota Lawyers Professional Responsibility Board held at Hamline University School of Law. Mr. Jorgenson provided the basic hypothetical example. This commentator has simply embellished and expanded upon it.

[34] See, Comment, Professional-Client Sex, supra note 5 at 1307-1312. See also, Firestone and Simon, Intimacy Versus Advocacy, supra note 4 at 2-7.

to another...with the analyst made the object of the shift."[35] Transference emotions are overwhelming unconsciously motivated feelings toward an attorney by the client that evokes past feelings and attitudes felt toward other important persons of authority, such as care providers or parents.[36] The goal of the psychoanalyst is to achieve transference of those feelings by the patient to the therapist.[37]

Similarities between the patient-therapist relationship and the attorney-client relationship are many in number.[38] Therein lies the hazard, because transference is the product of any relationship involving trust, regardless of whether a fiduciary seeks to achieve transference or not.[39] Introducing sexual contact into the relationship creates an environment of incest.[40] A client manifests the same feelings that one would have as a result of sex with a parent: shame, guilt, and anxiety.[41] This grave potentiality should not be left to chance.

Further, professionals engaging in sex with their clients are

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[35] New College Edition, American Heritage Dictionary, at 1363 (Houghton & Mifflin 1979).

[36] Firestone and Simon, Intimacy Versus Advocacy, supra note 4 at 3,7. Leonard L. Riskin and James E. Westbrook, Dispute Resolution and Lawyers, at 76 (West 1987).

[37] Comment, Professional-Client Sex, supra note 5 at 1309.

[38] Firestone and Simon, Intimacy Versus Advocacy, supra note 4 at 3.

[39] Id. at 6.

[40] Id. at 2.

[41] Id.

taking advantage of the trust invested in them as fiduciaries, thus exploiting attachments created by transference.[42] Feelings that are the product of transference are by nature unrealistic affection.[43]

The concept of countertransference raises concerns regarding the attorney's ability to maintain independent professional judgment. Countertransference is the counselor's conscious or unconscious emotional response to the person being counseled.[44] In effect, the professional subconsciously "buys in" to the transference taking place through countertransference and embraces the parental role.[45] The counselor who acts upon those feelings is equally indulging in unrealistic affection. Further, it is the counselor who is in a better position to understand this fact, either through his specialized training in the phenomena of transference and countertransference or because he realizes that he is in the superior power position as fiduciary.

It is reasonable to assume that some in the legal profession feel banning consensual sex, so called, between lawyers and clients based on the transference phenomenon places an undue burden upon

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[42] Comment, Professional-Client Sex, supra note 6 at 1303.

[43] Id. at 1309 n.134. (Quoting, Dr. Sigmund Freud, Further Recommendations in the Technique of Psycho-Analysis: Observations on Transference-Love, in 2 Collected Papers 377, 388 (Joan Riviere trans, 1950)). See also, Firestone and Simon, Intimacy Versus Advocacy, supra note 4 at 7. (Paraphrasing psychiatrist and law professor Andrew Watson).

[44] Joseph L. Daly, The Diverse Goals Involved in Treatment of the Mentally Ill, 8 J. Legal Med. 49, 84 n.225. (1987).

[45] Riskin and Westbrook, supra note 31 at 76.

members of the profession. One might ask, why are lawyers supposed to steer clear of such relationships because of a phenomenon they have no experience or training in detecting and understanding. First, this is not entirely the case.[46] Domestic relations attorneys have been advised to be capable of detecting the phenomenon.[47] Second, it is precisely the lack of understanding and recognition of ignorance that makes it incumbent on the legal profession not to test the potential consequences of a phenomenon we do not understand. Our profession cannot take chances on the impact of sex on the lawyer client relationship.

Some members of the profession do not believe that the emotional investment made in them by clients is as extensive as in the psychotherapist-patient framework. However, it is arguable that the legal profession courts and fosters just as profound a trust relationship as in the psychotherapeutic context or for that matter the medical profession. Clients are willing to pay considerable sums of money to attorneys for their expertise. Society looks to the profession to fill its leadership roles. These welcomed monetary and status gains should be and have been accepted by the legal profession. With this acceptance of elevated standing perhaps comes unwelcomed burdens and responsibilities to which one of high standing is expected to aspire. Finally, it is plausible that the reason many attorneys do not believe sexual

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[46] Firestone and Simon, Intimacy Versus Advocacy, supra note 4 at 6.

[47] Id.

involvement with their clients is transference-based and therefore feel no need to sever either relationship, is the fear that if the lawyer-client relationship were severed, they may discover that there is no longer a desire on the part of the former client to continue in the sexual relationship. "In almost all cases, the sexual relationship between the attorney and client would be unlikely but for the professional relationship which brought the partners together."[48] Under these circumstances, the client discontinuing sexual contact with the lawyer after the professional relationship had been severed could be perceived as prima facie evidence that transference had taken place in the fiduciary relationship. Whether they are willing to admit it or not, attorneys are clearly taking advantage of their status in order to engage in sexual relations. To think otherwise is an exercise in denial.

IV. THE LAWYER-CLIENT SEXUAL RELATIONSHIP MUST NOT BE CONSIDERED A FUNDAMENTALLY PRIVATE RIGHT

The right of privacy was first afforded constitutional protection by the United States Supreme Court in the case of Griswold v. Connecticut.[49] If a state chooses to impair a fundamental or constitutionally protected right the regulations limiting the right must be narrowly drawn so as to achieve a compelling state interest.[50] The Supreme Court recognizes that an

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[48] Davis and Grimaldi, Sexual Confusion, supra note 20 at 24.

[49] State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987). Citing, 381 U.S. 479 (1965).

[50] Comment, Professional-Client Sex, supra note 6 at 1324.

individual possesses a personal privacy right to the extent that he is entitled to , "'[an] interest in independence in making certain kinds of important [personal] decisions'...without unjustified government interference."[51] The Supreme Court has interpreted the right to privacy to include sexual privacy within the family right of privacy.[52] The Court has also extended the right to privacy to freedom of procreative choice.[53] It appears from Griswold and its progeny that the Court has been unwilling to expressly extend the right of sexual privacy to those engaging in sex extramaritally.[54] In Griswold, Justice Goldberg concurred stating that the holding in, "no way interferes with the State's proper regulation of sexual promiscuity or misconduct."[55] An attorney who exploits his fiduciary relationship with his client by engaging in sexual activity arguably has committed the misconduct Justice Goldberg concluded states were able to regulate. In Eisenstadt v. Baird, Justice Brennan opined that it is within the legislature's discretion to fashion means to prevent fornication.[56] It is not yet clear what the limit to that discretion is because the Supreme Court, "has not yet definitively answered the difficult question whether, and to what extent, the Constitution prohibits state

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[51] Id. at 1325.

[52] Davis and Grimaldi, Sexual Confusion, supra note 20 at 20.

[53] Id.

[54] Davis and Grimaldi, Sexual Confusion, supra note 20 at 20.

[55] Id. Citing, 381 U.S. at 498.

[56] Id. Citing, 405 U.S. 438, 449 (1972).

statutes regulating sexual behavior among adults."[57] It has been argued that even if the Constitution extends the right to privacy to include sexual privacy that it does not warrant the status of a right so fundamental that laws passed restricting it warrant strict scrutiny.[58] There is certainly a rational relationship between a state's interest in protecting the mental wellness of it citizens, maintaining standards of conduct to protect the population from unscrupulous and/or incompetent attorneys and a rule that prohibits sexual relations absolutely within the context of an attorney-client relationships designed to meet those aims.

> "Even an absolute rule prohibiting sexual relations between attorney and client during the professional relationship is not so restrictive that the attorney is unable to express himself sexually; he or she is only restricted from sexual intimacy with a client during legal representation. If the attorney wishes to engage in sexual acts with a client, a choice is presented: either to continue to act as attorney, and to forego a sexual relationship, or withdraw as counsel and thereby become free to engage in the sexual relationship."[59]

This is a very simple and modestly imposing requirement on the attorney's right to sexual expression.

Minnesota recognizes a constitutional right to privacy under its State Constitution.[60] The Minnesota Supreme Court agrees with the United States Supreme Court that the right to privacy protects

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[57] Comment, Professional-Client Sex, supra note 6 at 1328,1329.

[58] Davis and Grimaldi, Sexual Confusion, supra note 20 at 21.

[59] Id. at 22.

[60] State v. Gray, 413 N.W.2d at 111.

only fundamental rights.[61] Minnesota does not view the privacy right to be any broader than the right afforded under federal holdings.[62] If Minnesota were to impose on its attorneys a rule forbidding sexual relationships between attorneys and clients, no fundamental right would be infringed. Attorneys would still be able to engage in sexual expression outside of the professional relationship. An absolute ban would not be overly broad.[63] Requiring lawyers to be celibate while they practice law would be an example of a statute that was overly broad.[64] The distinction is simple, in the former scenario, lawyers are only forbidden from engaging in sex with existing clients. In the latter scenario, lawyers would be forbidden from having sex with anyone whether they were a client or not while the lawyer pursued his vocation.

V. WHY THE MSBA AND LPRB PROPOSALS ARE TOOTHLESS BEASTS WITH LIMITED DETERRENT EFFECT

Both of the petitions before the Minnesota Supreme Court are toothless beasts because neither provide advice on the type of discipline that violators of the rule would face. It is arguable that in general the states' disciplinary bodies have been lenient in sanctioning attorney's for engaging in sexual activities with clients.[65] When considering the potential harm that may be caused

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[61] Id.

[62] 413 N.W.2d at 114.

[63] Davis and Grimaldi, Sexual Confusion, supra note 20 at 22.

[64] Id.

[65] Id. at 13.

to a client it is appalling to think that attorneys who put their clients at risk will most likely face a simple public reprimand.[66] In Minnesota last year approximately 1,400 total complaints were filed with the Lawyers Professional Responsibility Board.[67] The office employs only 11 full-time paid attorneys to prosecute these complaints.[68] Even if more than half of these cases never require prosecution after preliminary investigation, simple mathematics shows that the human resources to prosecute these complaints is severely taxed. Further, it is believed that most incidents of attorney-client sex go unreported.[69] With these two forces working to place the odds against prosecution of those who violate the rule it is likely that attorneys will not take the matter seriously knowing that it is more than likely that they will not be prosecuted. Or, if they are prosecuted they probably won't face any greater sanction than a reprimand. An attorney will take the rule more seriously if he knows the rule imposes a mandatory minimum sixth month suspension for engaging in sexual relations with a client, with the possibility of being disbarred if he commits a second violation.

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[66] See, Id. at 13. The authors explain that the most common form of discipline is the reprimand.

[67] From Seminar on Ethics March 21, 1994 lecture conducted by Kenneth Jorgenson, Deputy Administrator Lawyers Professional Responsibility Board. Mr. Jorgenson stated that approximately 1400 complaints are filed with the LPRB every year. He explained that the prosecution office only has 11 full-time attorneys.

[68] Id.

[69] Davis and Grimaldi, Sexual Confusion, supra note 20 at 17.

The fact that both proposals also allow for contemporaneous sexual relations and representation when a sexual relationship predates a legal one is troubling.[70] The idea, that a presumptive legitimacy is granted to the simultaneous relationship because the sexual activity predates the legal representation, does not remove the potential for the harms articulated above.[71]

VI. HOW LAWYER-CLIENT SEXUAL RELATIONSHIPS NEGATIVELY IMPACTS THE INTEGRITY OF THE LEGAL PROFESSION

The Minnesota Supreme Court has the exclusive power to promulgate rules that govern the lawyers conduct.[72] The Minnesota Supreme Court has adopted the Rules of Professional Conduct to govern the ethical standards and conduct that lawyers who are admitted to practice in this state are required to observe. Therefore, it is clearly within the discretion of the Court to provide for a rule that sends a clear message to the profession that sexual relations between the lawyer and his client during the professional relationship is unacceptable and in violation of the Rules of Professional Conduct.

These days, who has not heard some kind of lawyer-related joke? One need look no further than popular culture to see and hear a clear indication that lawyers are not the most liked members of society. At the same time popular culture spends a lot of time

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[70] See, MSBA petition and LPRB petition, supra note 10.

[71] Id. at 24.

[72] Minn. Stat. §480.05 (1992).

scrutinizing and glamorizing the profession.[73] Lawyers are often accused of ambulance chasing, fee gouging, and being overly litigious. Whether or not these perceptions are accurate the opinions are certainly prevalent among our population. The potential social harm that lawyer-client sex may cause a client to suffer is only a part of the broader scale of harm the legal profession may impose on society.[74] It also undermines society's faith in the integrity of the legal profession.[75] When an attorney exerts his superior power over a client to obtain sexual advantage, he not only damages the client by breaching the trust relationship invested in him, he shows his questionable fitness to practice law by choosing to put self interest before the interests of his client.[76] If the public believes that professionals who breach the fiduciary relationship will get away with it, then the resulting distrust and animosity that results will be a social harm unto itself, because society will no longer have faith in these professionals.[77] A failure by the legal profession to respond to a public perception that has such grave social implications,

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[73] See, your local television listing. Shows such as L.A. Law, Law and Order or any of a number of Movies of the Week. The type of characterization that reflects poorly on the profession is the Arnold Becker type who seems facially to maintain ethical standards but when faced with opportunity to do so usually conducts himself in a less than ethical manner.

[74] Comment, Professional-Client Sex, supra note 6 at 1313.

[75] Id. Davis and Grimaldi, Sexual Confusion, supra note 20 at 24.

[76] Davis and Grimaldi, Sexual Confusion, supra note 20 at 24.

[77] Comment, Professional-Client Sex, supra note 6 at 1314.

threatening trust in society's institutions would be wholly irresponsible.[78] Fostering public faith in society's institutions is clearly a compelling state interest.

VII. AN ALTERNATIVE PROPOSAL

Anthony E. Davis and Judith Grimaldi have proposed a model rule of conduct to govern lawyers thinking of engaging in sex with their clients.[79]

> 1. A lawyer shall not, for so long as the attorney-client relationship continues to exist, have sexual contact with a client unless the client is the spouse of the attorney or the sexual relationship predates the initiation of the attorney-client relationship. Even in these provisionally exempt relationships, the attorney should strictly scrutinize his/her behavior for any conflicts of interest between the attorney's personal interests and the interests of the client, and to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may or will be impaired, or the client harmed by the continuation of the sexual relationship during the course of representation, the attorney should immediately withdraw from the legal representation.
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> 2. A LAWYER shall not have SEXUAL RELATIONS with a representative of a current CLIENT of the LAWYER if the SEXUAL RELATIONS, would, or would likely, damage or prejudice the CLIENT in the representation.
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> 3. For purposes of this rule, "sexual relations" means:
> (1) Sexual intercourse; or
> (2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.[80]

The Davis and Grimaldi Rule also imposes vicarious

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[78] Id.

[79] See, Davis and Grimaldi, Sexual Confusion, supra note 20 at 25 Proposed Rule.

[80] Id. at 25. (emphasis added)

disqualification of a lawyer's firm where a lawyer is required to decline or to withdraw from employment pursuant to the rule.[81] This commentator proposes that Minnesota adopt, in addition to the Davis and Grimaldi Rule, a provision that requires attorneys employed in the public sector to be held to the same standards as a those attorneys representing corporations governed under paragraph two of the Davis and Grimaldi Rule. The client shall be considered, for purposes of this rule, to be the entire citizenry of the community. The representative of the client would be the representative of the population who would potentially damage or prejudice the client if he were to engage in sexual relations with the client's attorney. For example, a district attorney prosecuting a murder case would be prevented from engaging in sexual relations with the murder victims mother during the course of the prosecution. Further, the Minnesota Rule should include a sanction provision that places violators on notice that they face a minimum of a six month suspension for violating the rule and potential disbarment for repeat offenses, or some other strict sanction. By adding teeth to Minnesota's Rule, lawyers would be put on notice that they would face serious penalty if they are caught. Thus, the stakes on gambling that the states limited prosecutorial resources prevent attorneys from being caught become higher, making the effect of selective enforcement a more effective

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[81] Id. Davis and Grimaldi have modeled this part of their proposed rule after Oregon's DR 5-105(C). However, they caution such a rule poses "Chinese wall" or "screening" problems, but they feel that the rule is workable.

deterrent.

VIII. CONCLUSION

When one considers the nature of the fiduciary role that professionals play in our society, it is easy to understand why society places such high standards of responsibility and accountability upon them. This level of accountability must be placed on lawyers. Society suffers when the general public believes that doctors, lawyers, and psychotherapists are only out to serve their own self interests.[82] Minnesota has shown it has a strong commitment to protecting it citizens and preserving the public trust in society's institutions by imposing high ethical standards upon the medical and psychotherapeutic professions in regards to prohibiting sexual exploitation of the professional relationship by professionals with their patients.[83] The same compelling state interests exist in the legal arena. The right of privacy for members of the profession would not be so impaired as to restrict their right to sexual expression it only asks that they choose which relationship is paramount.[84] The Court must remind those who pursue a vocation in law, that it is not just a job, it is a profession and an institution whose integrity must always be preserved. Anything less than an absolute ban would fail to achieve that objective.

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[82] Comment, Professional-Client Sex, supra note 6 at 1313,1314.

[83] See, Minn. Stat. §609.344(h),.345(h) (1992).

[84] Davis and Grimaldi, Sexual Confusion, supra note 20 at 25.

ATTORNEY/CLIENT SEXUAL RELATIONS: WHAT ARE THE JUSTIFICATIONS FOR A NEW RULE AND WHAT LANGUAGE SHOULD BE USED TO PROSCRIBE THIS CONDUCT?

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May 10, 1994
Seminar on Legal Ethics
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Introduction

A woman enters her attorney's office, hopeful about dissolving a painful marriage. She gives her attorney some basic facts about her case, and leaves after paying a retainer of $2000. On the second visit, the attorney makes personal comments to her and describes his past sexual encounters. The client asks for her retainer back and he refuses. On subsequent visits to her attorney's office, the client brings a friend but in the courthouse he manages to kiss her anyway. She rejects his advances and his interest in her case diminishes. About to become a single mother with an uncertain financial future, the woman endures, her $2000 paid for less than zealous representation. To terminate the relationship with this attorney would result in lost time and cost the client money.[1]

With no specific rule[2] prohibiting sexual conduct by an attorney and his client, complaints are often lumped together under conflict of interest,[3] fitness to practice,[4] the lawyer's

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[1] Cases such as Suppressed v. Suppressed, 562 N.E.2d 101 (Ill. App. 1990) contain elements of the fact pattern depicted in this paragraph.

[2]This writer, a Minnesota resident, has used the Model Rules of Professional Conduct and the Minnesota Rules of Professional Conduct as the ethical codes for this paper. The writer believes that these codes are the bases of authority for ethical conduct for the legal profession in the state of Minnesota where she expects to practice.

[3]**Minnesota Rules of Professional Conduct** Rule 1.7 (b) (1992). The rule provides in pertinent part:
(b) A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation . . .

independent judgment,[5] or administration of justice.[6] Consequently, cases such as the one above fall between the cracks. With no specific rule sanctioning attorney-client sexual relations, women[7] as the victims of an attorney's sexual advances believe their claims will be futile;[8] they are

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[4]**Minnesota Rules of Professional Conduct** Rule 8.4 (1992). Rule 8.4 provides in pertinent part:

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(g) harass a person on the basis of sex . . . disability . . . or marital status in connection with a lawyer's professional activities . . .

[5]**Minnesota Rules of Professional Conduct** Rule 2.1 (1991) Rule 2.1 provides in pertinent part:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice . . .

[6]**Model Rules of Professional Conduct** Rule 8.4(d) (1991).

[7]The use of terms to denote the attorney as "he" and the client as "she" reflect the case law on attorney/client sexual relations. There is only one case in which the attorney was a woman. See, Committee on Professional Ethics and Conduct v. Durham, 279 N.W.2d 280 (Iowa 1979).

[8]Sheila James Kuehl of the California Women's Law Center states that the message given by the bar associations is that this is not a serious matter. Joanne Pitulla, Unfair Advantage, **ABA Journal**, November 1992, 76, 77. Kuehl believes that the bar associations pretend that this is consensual sex and ignore the power differential. Id. Kuehl says that she receives many calls from women who are upset and discouraged because they believe they have nowhere to go with this problem. Id. Kuehl further believes that women clients are intimidated because the attorney has their money and their court documents. Id.

reluctant to file a claim that will force them to be re-victimized by the system.[9]

Recognizing this loophole, several states have recently passed disciplinary rules sanctioning sexual relations between attorneys and clients. California has adopted a rule[10] that attorneys shall not require or demand sexual relations with a client as a condition of any professional representation nor employ coercion, intimidation, or undue influence in entering sexual relations with a client. The Oregon State Bar adopted a broader per se ban in September of 1992 which bans[11] all attorney/client sexual relations unless a prior relationship had existed between the client and attorney. Other states such as Florida and Illinois are drafting proposed rules.[12]

The Minnesota State Bar Association (MSBA), following this trend, voted in January of 1994 to petition the Minnesota Supreme Court to adopt a new rule prohibiting attorney/client sexual

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[9]Clients do not pursue complaints against attorneys who have engaged in sexual relations with them because they are told that the conduct is not prohibited. Pitulla, supra note 8, at 78. Or, sexually exploited clients fail to come forward because they are embarrassed. Id. Given that the victims of sexual assault or harassment rarely report this type of abuse, Lynn Hecht Schafran of the NOW Legal Defense Fund states that it is reasonable to assume that clients sexually abused by lawyers are reluctant to come forward. Id.

[10]See Appendix D for full text of this rule.

[11]See Appendix C for full text of this rule.

[12]See Appendices E and F for full text of these rules.

relations.[13] The language of the MBSA rule[14] proscribes attorney/client sexual relations when a current client is emotionally or financially vulnerable with a presumption that the sexual relations are likely to impair the client's or lawyer's independent judgment. The MSBA rule also places on the attorney the burden to demonstrate that his or her judgment was not impaired.

Subsequently, in March of 1994, the Minnesota Lawyers Professional Responsibility Board (LRPB) petitioned the Minnesota Supreme Court to adopt a per se rule banning attorney client/sexual relations. This rule[15] includes no presumptions that the client's or attorney's judgment is impaired nor demands that the attorney meet the burden of proving that his judgment was not impaired. The Minnesota Supreme Court has made no decision to date on which rule it will adopt.

As Minnesota and other states begin adopting these new rules for inclusion in state professional responsibility codes for lawyers, this paper poses these questions. What language best captures the character of the misconduct and the type of the public harm the rule seeks to prevent? Do lawyers as a professional group strive to send a message by the adoption of a new rule that all attorney/sexual relations are sanctioned? Or,

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[13]David Shaffer, Lawyers support rule on sex with clients, St. Paul Pioneer Press, Jan. 30, 1994, at B1, B6.

[14]See Appendix A for full text of this rule.

[15]See Appendix B for full text of this rule.

do attorneys seek to impose restrictions on their behavior that prevents the exploitation of women sexually or prohibits attorney demands for sexual favors from women at a time when they are in a vulnerable position emotionally or financially? Are there specific women's concerns in the area of attorney-client sexual relations and how can a new disciplinary rule be written to best reflect their concerns? Finally, while reflecting the special needs of women, a rule prohibiting this conduct should create a solution that gives notice to clients as to what conduct to expect and tolerate from their lawyers, deters attorneys from engaging in such behavior, and clarifies for attorney disciplinary committees and courts the proscribed boundaries of attorney conduct.[16]

I. Justifications for the Imposition of a New Rule

There are various justifications for the imposition of sanctions prohibiting attorney/client sexual relations. One set of reasons, transference and fiduciary theory, focus on the client. Both of these theories reflect the power imbalance in attorney-client relationships. Another rationale focuses on the attorney and the conflicts of interest and threats to independent judgment and client confidences created by entering into attorney-client sexual relations during the course of

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[16]John M. O'Connell, Note, Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule, 92 Col. L. Rev. 887, 921 (1993).

representation. Finally, there are justifications for the imposition of sanctions to protect the reputation of the legal profession as a whole.

A. Client-centered Justifications

In the transference phenomenon, the client is "dependant on the professional [attorney] to whom she has turned for help, where a 'rapport' has been established in the professional relationship."[17] This transference renders the client vulnerable; she is susceptible to coercion and unable to give consent.[18] She believes that the attorney is acting in her best interest. Consequently, the client is unable to judge appropriately whether to enter into sexual relations with her attorney as she could with other men with whom no transference has taken place. She is unable to separate the sexual part of the relationship from the professional aspects. Thus, sexual relations between attorney and client create an abuse of the transference phenomenon.[19]

The second theory justifying sanctions prohibiting attorney/client sexual relations from the client's perspective is fiduciary theory. A fiduciary duty is "to act for someone else's benefit, while subordinating one's personal interests to that of

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[17]Nancy E. Goldberg, Sex and the Attorney-Client Relationship: An Argument for a Prophylactic Rule, 26 Akron L. Rev. 45, 56 (1992).

[18]Id. at 58.

[19]Id.

the other person."[20] Consequently, the parties in such a relationship do not deal on equal terms.[21] Because of the power imbalance between the attorney (fiduciary) and the client (entrustor), the law places duties on the fiduciary to protect the less powerful individual.[22]

A California court, in an attorney/client sexual relations case, has described this fiduciary relationship as one where the "parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependant party."[23] The professional in whom trust and confidence is reposed has the burden to prove that he has not exerted undue influence and breached his fiduciary duty.[24]

A breach of the fiduciary duty occurs when any activity or interest of an attorney interferes with the fulfillment of the duties entailed by legal representation, compromises the required commitment to the client's cause, or damages the client.[25] There

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[20]**Black's Law Dictionary** 625 (6th ed. 1990).

[21]Linda Mabus Jorgenson & Pamela K. Sutherland, Fiduciary Theory Applied to Personal Dealings: Attorney-Client Sexual Contact, 45 **Arkansas L. Rev.** 459, 485, (1992).

[22]Id.

[23]Barbara A. v. John G., 145 Cal. App.3d 369, 383 (1983) (where the client has sued her attorney in a tort action alleging a breach of the fiduciary duty because the attorney misrepresented to his client that he was sterile and she subsequently suffered an ectopic pregnancy).

[24]Id.

[25]Jorgenson and Sutherland, supra note 21, at 485.

are several consequences to a client when an attorney breaches his fiduciary duty. When the client entrusts the attorney with information, the attorney gains an unfair advantage in negotiations between them. As a result, a client may be emotionally or financially vulnerable to coercion by her lawyer. This coercion, whether overt or subtle, may consequently result in a client's inability to give genuine consent to a sexual relationship. Financial vulnerability also may preclude the client from changing attorneys.[26]

While there is no rule expressly requiring attorneys to uphold their fiduciary duties to clients, this duty is an underlying theme in the Rules of Professional Conduct. For example, attorneys are required to maintain client confidences, competently represent their clients, engage in zealous representation and due diligence, and communicate with their clients.

In a business setting, lawyers have long been held to have fiduciary duties when handling their clients' financial matters. Business deals between attorneys and their clients are disfavored because of "the position of influence attorneys have over their clients . . . the possibility that they could use this position to take advantage of their client's business dealings."[27] For example, the Model Rules of Professional Conduct preclude

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[26]O'Connell, supra note 16, at 910.

[27]Jorgenson and Sutherland, supra note 21, at 488 (citing Business Transactions with Clients, Laws. Man. on Prof. Conduct (ABA/BNA) 51:502 (Jan. 20, 1988).

attorneys from negotiating book contracts with clients while still representing the client.[28]

Although the fiduciary responsibility owed by an attorney coexists with the business aspect of the legal relationship, the application of fiduciary principles is not limited to financial contexts. The same principles underlying the fiduciary duties of attorneys which require them to act with utmost good faith when handling their clients' money dictates that attorneys also be required to exercise good faith in regard to their clients' persons.[29]

Courts have relied on fiduciary duty when upholding disciplinary actions against attorneys who have engaged in attorney/client sexual relations in jurisdictions without sanctions for such conduct. In **In re Gibson**,[30](where attorney Gibson was retained to advise both husband and wife on their marital difficulties and Gibson, after discussing sexual matters with the clients, sexually assaulted the wife telling her that was necessary to relieve sexual tensions) the Wisconsin Supreme Court upheld sanctions against attorney Gibson by stating that "the attorney stands in a fiduciary relationship with the client and should exercise professional judgment solely for the benefit of the client and free of compromising influences and loyalties.

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[28]**Model Rules of Professional Conduct** Rule 1.8 (1991).

[29]O'Connell, supra note 16, at 910.

[30]369 N.W.2d 695 (Wis.), **appeal dismissed**, 474 U.S. 976 (1985).

By making unsolicited sexual advances to a client, an attorney perverts the very essence of the attorney/client relationship."[31] [32]

B. Attorney-centered Justifications

Sexual relations between attorney and client are likely to create conflicts of interest issues for the attorney, as well as interfere with the attorney's ability to exercise independent judgment and maintain client confidences. If an attorney becomes involved with a client, he may be incapable of assessing his client's best interest and consequently be ineffective as an advocate for her position.

Conflicts of interest are addressed by the Model Rules of Professional Conduct. Model Rule 1.7 states that an attorney

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[31] Id. at 699-700.

[32] Other courts have also relied on fiduciary duty in their imposition of discipline on attorneys who have engaged in attorney/client sexual relations. In **Bourdon's Case**, 565 A. 2d 1052 (N.H. 1989) the New Hampshire Supreme Court disbarred an attorney who preyed upon the client's vulnerability and later exploited her sexually. The attorney in this divorce case was aware of his client's vulnerability after their consultations where he had learned her age, the physical abuse inflicted upon her by her husband, her age at the time of her marriage, and that her husband had left her for another woman.

The Iowa Supreme Court also focused on the vulnerability of the client in **Committee on Professional Ethics & Conduct v. Hill**, 436 N.W.2d 57 (Iowa 1989) when it suspended an attorney for three months who accepted sex in exchange for legal fees in a divorce action. The client was known as an emotionally unstable woman with a drug addiction history.

The court in **In re Bowen**, 542 N.Y.S.2d 45 (App. Div.), **appeal denied**, 545 N.E.2d 868 (N.Y. 1989) also found that a client in a divorce case becomes vulnerable and emotionally dependant on an attorney when she must "tell all" to her attorney.

"shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests . . . [33] If the attorney becomes personally involved, this self interest can cause the attorney to lose his objectivity.[34]

Numerous examples of these conflicts of interest exist, most notably in the area of marriage dissolution. In **People v. Zeilinger**,[35] an attorney engaged in sexual relations with a client while representing her in a divorce proceeding. By entering into sexual relations with the client, the attorney destroyed the couple's chance for reconciliation and thwarted his ability to exercise independent judgment. The court found that the attorney could have also become the focus of the contested case and be called on as a witness[36] to testify in a custody proceeding or on property division.[37]

A sexual relationship may blur the contours of an attorney/client relationship and result in the loss of privilege for attorney/client confidences. These confidences are protected only when they are imparted in the context of the attorney/client

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[33]**Model Rules of Professional Conduct**, Rule 1.7 (1991).

[34]Anthony E. Davis and Judith Grimaldi, Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule, 7 **Notre Dame J.L. Ethics & Pub. Pol'y** 57, 65 (1993).

[35]814 P.2d 808 (Colo. 1991).

[36]See Model Rule 3.7 which requires that a lawyer terminate representation if the attorney is likely to be called as a witness against his client.

[37]Id. at 810.

relationship.[38] Consequently, a hazy line between the professional and personal relationship may obscure which attorney/client confidences are protected by privilege.[39]

C. Profession-centered Justification

Failure to add a new rule to professional codes prohibiting attorney/client sexual relations perpetuates whatever negative image of attorneys that may exist in the public's mind. Condoning attorney/client sexual relations would further denigrate the poor impression of the legal profession. Certainly the ethical rules, whose primary purpose is to protect the public, should include a new rule that shields the public from the "Arnie Becker"[40] characters of the profession.

In addition to protecting the public, the ethical rules also seek to uphold the integrity of the profession. One court,in its ruling disbarring an attorney for harassment and intimidation of a former client after a sexual relationship, stated that the "conduct lessened public confidence in the legal profession."[41]

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[38]Sexual Relations with Clients, ABA Formal Opinion 92-364 (1992).

[39]See, e.g., In re Marriage of Kantar, 581 N.E.2d 6, 14 (Ill. App. 1991) where the court stated that "even if the confidential relationship of the lawyer and client is indisputably formed, it does not follow that every communication between them will be privileged."

[40]Arnie Becker was a divorce attorney character in the NBC television series, L.A. Law. Arnie often seduced his female clients on the show.

[41]In re Frick, 694 S.W.2d 473, 481 (Mo. 1985).

Rule 8.4[42] of the Model Rules of Professional Conduct, titled "Maintaining the Integrity of the Legal Profession" sets out various provisions violations which would harm the reputation of the legal profession. Thus, a new rule sanctioning attorney/client sexual relations would establish that the legal profession no longer disregards attorney/client sexual relations; rather, members of the profession hold themselves to the same standard as other professional groups such as doctors whose ethical codes have prohibited sexual relations.

Even when attorneys have been disciplined for attorney/client sexual relations, the disciplinary process has been lenient in the sanctions imposed on attorneys.[43] With no specific provision prohibiting attorney-client sexual relations, there is little recourse to discipline attorneys. Thus, the usual punishment has been a public reprimand in a published opinion.[44] Suspensions from law practice have sometimes been imposed, varying from thirty days to two years, the latter only for the most serious offenses.[45] Disbarment has occurred only for repeat offenses or where criminal sentences have been imposed.[46] The variability of the sanctions imposed demonstrates the

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[42]See, supra note 4 for applicable provisions of Rule 8.4.

[43]Davis and Grimaldi, supra note 33, at 79.

[44]See, e.g., In re Adams, 428 N.W.2d 786 (Ind. 1981).

[45]See, e.g., Gibson, 369 N.W.2d 695 (Wis. 1985).

[46]See, e.g., Bourdon, 565 A.2d 1052; Bowen, 542 N.Y.S.2d 45 (N.Y. App. Div. 1989).

profession's ambivalence on attorney-client sexual relations and the need for a rule prohibiting such conduct.

II. Current Provisions of Rules Sanctioning Attorney/Client Sexual Relations

Approaches to sanctioning attorney/client sexual relations have taken two tacks. The first approach has been to focus on whether the conduct interferes with the legal representation with ensuing harm to the client. The second approach has been to prohibit all attorney/client sexual relations as per se unethical.

A. The Narrow Rule

The narrow rule is exemplified by the MSBA proposed rule[47] and the California Rule of Professional Conduct 3-120.[48] The first focus of these rules is on the vulnerability of the client and the ability of an attorney to prey upon this emotional or financial condition to coerce, intimidate, or exert undue influence to engage in sexual relations. The second focus of these rules is to prohibit an attorney from representing a client when sexual relations impair the attorney's judgement or cause the attorney to perform his legal responsibilities incompetently. Thus, the limited rule addresses the evils that should be

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[47]See Appendix A for the full text of this proposed rule.

[48]See Appendix D for the text of this rule.

included in any rule; that is, the potential for coercing vulnerable clients and the possibility of impairing the independent judgment of the attorney.

Narrow rules focus on specific fact patterns where the client is apt to be vulnerable. The narrow rules reflect the notion that each sexual relationship may be characterized by a distinct set of circumstances; the maturity of the parties, whether or not the client is vulnerable, or the nature of the subject matter of the representation.[49] Furthermore, Minnesota Women Lawyers (MWL), an association of 970 women attorneys, advocates that sexual relationships should be allowed if the attorney can continue to exercise his or her professional judgment. According to MWL, the proposed MSBA rule[50] forces attorneys to consider whether their judgment is impaired.[51]

Supporters of rules such as the one proposed by the MSBA believe that a lawyer-client sexual relationship does not per se impair the lawyer's ability to competently perform the legal services required.[52] For example, much legal work does not

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[49]California State Bar Ethics Op. 1987-92 (1987).

[50]MWL set up a task force in the fall of 1993 to research the issue of attorney/client sexual relations. MWL drafted a rule which was adopted on January 29, 1994 by the MSBA House of Delegates. The proposed rule is now before the Minnesota Supreme Court which will decide whether or not to amend the state's ethical rules. Donna Halvorsen, Ban Urged on Lawyer-Client Sexual Relationships, Minneapolis Star-Trib., Jan. 30, 1994 at 1B.

[51]Statement of Reasons in Support of Proposed Amendment to the Professional Rules of Conduct, Minnesota Women Lawyers.

[52]California State Bar Ethics Op., supra note 49.

concern sensitive personal issues, but rather more factual matters of business and property. The Association of Professional Responsibility Lawyers (APRL) has complained that importing the transference idea and its overtones of dependency and disadvantage to a business setting causes some conceptual snags.[53] The classic case they raise is that of a sophisticated corporate client. Obviously, personal involvement in a case of this type is limited.

This position is reflected in the comments of APRL attorney, Diane Karpman.[54] She suggested that the central point of the analysis should be the delivery of legal services: were the services properly discharged, was the fiduciary obligation discharged appropriately, and did the lawyer proceed with zealousness and loyalty? In her estimation, a rule focused on harm to the client would be more useful than a blanket rule prohibiting sexual relations.[55]

The narrow rule also appears to focus more directly on

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[53]Lawyers Who Defend Lawyers Argue Over Rules on Client Sex, Laws. Man on Prof. Conduct (ABA/BNA), vol. 9, no. 15, at 238 (1993).

[54]Id. at 238 (1993). Ms. Karpman also made the following remarks. She stated that she was incredulous that the bar still focuses on whether sex occurs to determine if the client has been harmed. Id. She called the rule a "puerile point of view," and chastised the largely male audience for being the main players in inappropriate relationships with clients. Id. She described the California rule prohibiting sex with clients as a gender bias rule, and told the audience that "as a lady lawyer, I don't want to be bound by a paternalistic rule restricting relationships with clients just because you guys have a problem." Id.

[55]Id.

women's concerns. First, it bases its provisions on the vulnerability of women in certain legal situations and recognizes that attorneys may improperly influence or coerce women into sexual relations during emotionally or financially turbulent times. By its silence, however, it also grants women the respect to make their own decisions as to when they wish to engage in sexual relations as attorneys or clients should they so choose. Further, it reposes in both women and men the professional ability to distinguish when and if their actions are harming either their client or the representation.

In adopting a narrow version of the rule, the California State Bar considered the constitutional issues involved in limiting sexual relationships between people. The Bar concluded that a per se ban was too broad to meet a constitutional challenge. Consequently, California attempted to tailor its new rule as the least restrictive alternative available to achieve compelling state interests. These interests in adopting a rule prohibiting attorney/client sexual relations were to protect the professions, to protect the public welfare in relation to the services provided by regulated professions, and to prevent the loss of professional judgment and avoidance of conflicts of interest.[56]

California's concern was that a new rule must balance compelling state interests with an individual's right to privacy

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[56]Davis and Grimaldi, supra note 34, at 93(citing State Bar of California, Request that the Supreme Court of California Approve Proposed Rule 3-120 at 7-8).

and freedom to associate. A close match between the state's interests and the rights of individuals eliminated the possibility of the new sanction being over inclusive (overbroad) and over regulatory. Therefore, the California adopted language in its new rule which allowed attorneys to engage in consensual relationships with clients as long as the relationship was not induced by coercion or other methods.[57]

B. The Per Se Ban Rule

The per se ban on attorney/client sexual relations is reflected in the language of the LPRB proposal to the Minnesota Supreme Court[58] and the language of the Oregon Rule of Professional Responsibility DR5-110.[59] Both rules state that the attorney shall not engage in sexual relations with the client unless a consensual relationship existed between the parties before the commencement of the professional representation. The per se approach is based on the theory that the representation is automatically impaired by sexual relations. Proponents of this rule would argue, for example, the independent judgment of the attorney is unequivocally compromised by sexual relations with the client in any circumstance.

The per se ban gives lawyers a clear standard and adequate notice as to the conduct sanctioned by the new rule. "[The per se

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[57]Id.

[58]See Appendix B for the text of this rule.

[59]See Appendix C for the full text of this rule.

rule's] 'bright line' would provide the best and clearest notice to members of the profession of what their disciplinary consequences might be."[60] It also sends a clear message to the public that lawyers are willing to discipline misconduct within their ranks.

Proponents of a per se ban also believe that such a rule would limit the re-victimization of clients in the course of a disciplinary hearing. If attorney/client sexual relations were completely banned, no investigation would be needed to demonstrate that the judgement of the client or attorney was impaired or that the client was vulnerable.[61]

C. Further Comments on the MSBA and LPRB Rules

Those currently advocating for a limited rule as proposed by the MSBA have included a presumption that the attorney has violated the proposed rule; he has both the burden of production and the burden of persuasion to establish that the rule has not been violated. This provision sends a clear message that attorney/client sexual relations will not be condoned. Further, it serves as a deterrent to those considering engaging in such conduct, thereby reducing the amount of victimization women endure from unscrupulous attorneys.

However, this presumption does create other problems. At

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[60]New Rule Would Spell Out Risks of Attorney-Client Sexual Relations, **MSBA In Brief**, vol. 10, No. 2 at 3 (February 1994).

[61]Id.

first blush, the presumption provision of the MSBA rule appears helpful to women because both the burden of production and the burden of persuasion fall on the offending attorney. However, by failing to define "vulnerability," women involved in future disciplinary actions will be revictimized; they will be forced to establish their emotional or financial vulnerability, or that their judgment had been impaired. A carefully drafted definition of "vulnerability" could correct this oversight.

The MSBA proposed rule includes an additional provision relating to third party allegations of attorney/client sexual relations. In Subdivision (4), the Director "in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation of the charge." This provision allows women to avoid the hardships associated with participating in these processes.

The MSBA rule contains a narrow definition of "sexual relations." The definition includes sexual intercourse and "any other intentional touching of the intimate parts of the attorney." Why does this definition focus only on the attorney? California, for example, uses similar language to the MSBA rule but uses "another person" rather than just "the attorney." The LPRB and Oregon both take a broader approach, referring to the intentional touching of another person. Certainly there are situations where the sexual relations may consist of

intentionally touching only the client. The MSBA definition which limits the touching to the attorney appears to be a too-narrow formulation for sexual acts.

Both the MSBA and the LPRB take narrow views on the scope of an organization when the "client" is an organization. The rules consider the "client" in this setting as the one who has decision-making authority in the case. Such provisions in both rules grant attorneys and individuals within large organizations greater autonomy in their sexual relationship choices.

The LPRB proposed rule suffers most from its overbreadth. Although its message is clear that attorney/client sexual relations are prohibited, many attorneys will have their choice of sexual partners unnecessarily curtailed. Consider the situation of a county attorney; she would be unable to have sex with anyone in the county because all of the county residents are her clients.[62] Are all county residents emotionally or financially vulnerable?

It is precisely this overbreadth problem which forces this writer to prefer the MSBA rule. The MSBA rule focuses on the power disparity and the resulting vulnerability of the client who seeks counseling at an emotionlly turbulent time in her life. To sanction other attorney/client sexual relations outside of this circumstance creates a rule that sweeps too broadly.

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[62]Halvorsen, supra note 50, at 5B.

Conclusion

Questions posed in the introduction can be answered by the foregoing analysis of the justifications and proposed langauge of the new rules. It is clear that the language of the LPRB rule sends a clear message that all attorney/client sexual relations are prohibited while the MSBA rule seeks to impose restrictions on the legal profession that prevents the exploitation of women at a time when they are vulnerable. Based on this vulnerability focus, this writer believes the MSBA rule more adequately captures the character of the misconduct. Further, the MSBA rule, although a narrow rule, still gives clients notice as to what conduct they can expect from their lawyers, will deter attorneys from engaging in such behavior, and clarifies the proscribed boundaries of attorney conduct.

Rules seeking to prohibit attorney/client sexual relations when the client is emotionally or financially vulnerable represent part of the paradigm shift granting women greater recognition under the law.[63] With the advent of the women's movement, the law has become more responsive to women's experience, giving the problems women face legal names and reshaping the law accordingly. The law now views sexual harassment, domestic abuse, and most recently, stalking, as cultural problems that are defined by the law rather than

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[63]Tamar Lewin, New Laws Address Old Problem: The Terror of a Stalker's Threats, **N.Y. Times**, Feb. 8, 1993 at A1.

dismissed as individual problems. Certainly, the decision by members of the Minnesota Bar to sanction attorney/client sexual relations is part of this paradigm shift. The Minnesota Bar and a limited number of other jurisdictions now acknowledge that women are emotionally or financially vulnerable in certain legal contexts; thus, the law should represent their interests as members of the public with some specificity. This decision by the State Bar gives women a legal name for the humiliation to which they may have been subjected by the "Arnie Beckers" of the legal profession. Rather than forcing women to file complaints under other provisions that do not directly sanction the conduct at issue,[64] the rules address this egregious conduct. Moreover, these proposed rules attempt to sanction this conduct without revictimizing women in the process.

More importantly, no matter what rule is adopted by the Minnesota Supreme Court and other state courts considering new rules, the legal profession has clear notice that the conduct will result in discipline.

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[64]See, supra notes 8 and 9 and accompanying text describing the frustration women have experienced without such a rule.

Appendix A

MSBA proposed rule
Amendment of Rule 1.8
Conflict of Interest
Prohibited Transactions

Rule 1.8(k)

1. A lawyer shall not:

(A) Have sexual relations with a current client in situations in which the client is emotionally or financially vulnerable; or

(B) Represent a client or continue representing a client with whom the lawyer has engaged in sexual relations if the lawyer's or the client's independent judgement is likely to be impaired thereby.

(2) For the purposes of this paragraph:

(A) Sexual relations means sexual intercourse or any other intentional touching of the intimate parts of the lawyer.

(B) If the client is an organization, any individual who oversees and has decision-making authority regarding the representation shall be deemed to be the client.

(C) This rule does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work of the client.

(3) In any disciplinary proceedings involving an alleged violation of thee rules, a lawyer who engages in sexual relations with a client will be presumed to violate Rule 1.8(k) paragraph (1)(B). A lawyer who engages in sexual relations with a client shall have both the burden of production and the burden of persuasion that Rule 1.8(k) paragraph (1)(B) is not violated.

(4) If a party other than the client alleges violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

(5) Rule 1.8(k) shall not apply to ongoing consensual sexual relationships which predate the initiation of the lawyer-client relationship.

Appendix B

Lawyers Professional Responsibility Board
Proposed Rule
Rule 1.8 Conflict of Interest: Prohibited Transactions

Rule 1.8(k)

A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced or after it ended. For purposes of this paragraph:

(1) "Sexual relations" means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.

(2) If the individual client is an organization, any individual who oversees the representation and gives instructions on behalf of the organization shall be deemed to be the client. In-house attorneys while representing governmental or corporate entities are governed by Rule 1.7(b) rather than by this rule with respect to sexual relations with other employees of the entity they represent.

(3) This paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work of the client.

(4) If a party other than the client alleges a violation of this paragraph, and the complaint is not summarily dismissed, the Director, in determining whether to investigate the allegation and whether to charge any violation based on the allegation, shall consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge.

Appendix C

Oregon Rules of Professional Responsibility
DR5-110

(A) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual relationship existed between them before the lawyer/client relationship commenced.

(B) A lawyer shall not have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(C) For purposes of DR 5-110 "sexual relations " means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(D) For the purposes of DR 5-110 "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

Appendix D

California Rule of Professional Conduct 3-120

(A) For the purposes of this rule, sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purposes of sexual arousal, gratification, or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of Rule 3-110.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to on-going consensual sexual relationships which predate the initiation of the lawyer-client relationship.

(D) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of the client, the lawyers in the firm shall not be subject to discipline under this rule solely because of the occurrence of such sexual relations.

The following provision was excised from the final version of the rule:
(E) A member who engages in sexual relations with his or her client will be presumed to violate Rule 3-120. The presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606.

Appendix E

Florida Proposed Rule 4-8.4

Lawyer/Client Sexual Relationships. A lawyer shall not engage in sexual relations with a client unless the relationship is in existence at the commencement of the lawyer/client relationship.

(1) Sexual Relations with Clients. If a lawyer and client engage in a sexual relations contrary to the provisions of this subdivision, the lawyer shall withdraw from further representation of the client.

(2) Sexual Relations With Employees or Representatives of the Client. If a lawyer and an employee or representative of the client engage in sexual relations contrary to the provisions of this subdivision, and if the sexual relations are likely to cause prejudice to the client, the lawyer shall withdraw from further representation of the client. For purposes of this subdivision, sexual relations between the lawyer and an employee or representative of the client shall be presumed to cause prejudice to the client.

(3) Sexual Relations With Other Lawyers. If a lawyer engages in sexual relations with another lawyer who represents an interest adverse to the lawyer's client, the lawyer shall withdraw from further representation of the client unless the client is informed about the existence of the relationship, the potential conflicting interests involved, and thereafter consents to the continuation of the representation.

For purposes of this subdivision sexual relations means sexual intercourse or the touching of an intimate part of another person for the purpose of arousal or gratification.

Appendix F

Proposed Illinois Rule 1.17
Drafted by the Chicago Bar

(a) A lawyer shall not, during the representation of a client, engage in sexual relations with the client if:

(1) The sexual relations are the result of duress, intimidation, or undue influence by the lawyer; or

(2) The lawyer knows or reasonably should know that the client's ability to decide whether to commence sexual relations is impaired by the client's emotional or financial dependency, or some other reason.

(b) Where a lawyer in a firm has sexual relations with a client, the other lawyers in the firm shall not be subject to discipline solely because of the occurrence of such relations.

THE DIVERSE GOALS INVOLVED IN TREATMENT OF THE MENTALLY ILL

IS A COLLISION INEVITABLE?

Joseph L. Daly, J.D.*

INTRODUCTION

The elderly bag lady roams the streets of New York carefully examining the trash cans to see if they will yield anything edible. Meanwhile, in Washington, D.C., a young man with a history of mental illness attempts to assassinate the President of the United States. Between the harmless bag lady and the dangerous assassin lie a multitude of persons our society terms "mentally ill," each displaying varying degrees of deviation from what that same society deems "normal" behavior.

Statutes provide for the custody and restraint of persons who display potentially dangerous behavior, and these statutes are enforced through a compulsory civil commitment process which purports to afford such persons "treatment" for mental illness. For years the rights of persons who were committed were ignored or abused but, in the last 15 years, courts have expanded patients' rights. Since our society places a high value on individual liberty, it is especially important that individual values be protected in an environment which represents a "massive curtailment of liberty."[1]

The subject of mental health immediately brings to mind two

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[1] Humphrey v. Cody, 405 U.S. 504, 509 (1972).

conducted in accordance with such principles... [and make] recommendations."[209]

The Act also established the National Advisory Council for the Protection of Subjects of Biomedical and Behavioral Research[210] to "review policies, regulations, and other requirements" of the Department of Health, Education and Welfare (now the Department of Health and Human Services).[211] Today, a comprehensive set of federal regulations governs research involving human subjects, requiring, inter alia, careful review of proposed research protocols by federally approved institutional review boards.[212]

The dilemma with experimentation on humans and a possible solution can be summed up as follows:

> The torrent of adverse reaction... points out vividly that public sensitivity is an essential consideration in the undertaking of an experiment, irrespective of its scientific promise. On the other hand, there is an ethical imperative to increase experimentation.... Experimenters, however, should not have to rely on poor, uneducated, or institutionalized persons who in turn for inexpensive care or release consent to an experiment.... To obtain subjects for experimentation, awards and honors like those awarded to spacemen should be given to volunteers. Society has high stakes in research. It should attract volunteers and pay the cost of unpredictable results. As a minimum, there should be a "no fault" clinical research insurance plan to make certain that subjects in experimentation are compensated, or taken care of, if harmed.[213]

V. SEXUAL EXPLOITATION OF THE MENTALLY ILL

"From the font of psychiatric knowledge to the modern practitioner we have common agreement of the harmful effects of sensual intimacies between patient and therapist."[214] Hippocrates and Freud, as well as modern mental health organizations, the American Medical Association, and the American Psychiatric Association, have spoken out against sexual relations between therapists and clients.[215] This is an area in which the courts and the mental health profession are in agreement on the rights

[209] *Id.*
[210] Pub. L. No. 93-348, Part B, § 211, 88 Stat. 342 (1974).
[211] Pub. L. No. 93-348, Part B, § 211 at (f)(2)(B).
[212] *See generally* 45 C.F.R. § 46.101, et seq. (1985).
[213] R. SLOVENKO, *supra* note 147, at 273, *citing* N.Y. Times, March 21, 1973, at 30.
[214] Roy v. Hartogs, 381 N.Y.S.2d 587, 590 (1976) (Markowitz, J., concurring).
[215] Gantrell, *Psychiatrist-Patient Sexual Conduct: Results of a National Survey*, 143 AM. J. PSYCHIATRY 1126, 1129 (1986).

of the mentally ill. And yet, recent attention has focused more and more on the issue of sexual exploitation of the mentally ill as instances of this practice continue to surface.

A 1986 study which evaluated psychiatrist-patient sexual conduct found that, of the 26 percent of the psychiatrists sampled who responded to the survey, 6.4 percent acknowledged having had sexual contact with their own patients.[216] It was further reported that "[t]he 6.4 percent overall prevalence of psychiatrist-patient sexual contact in this survey is consistent with the prevalence of therapist-patient sexual contact reported in previous surveys of psychiatrists and psychologists that had considerably higher return rates."[217]

One of these studies found that of 46 percent of psychiatrists sampled who responded to the survey, 10 percent reported having engaged in erotic behavior with patients, 5 percent to the point of intercourse.[218] A similar study done with psychologists elicited a 70 percent return of inquiries and found that 5.5 percent of male and 0.6 percent of female licensed Ph.D. psychologists admitted to having had sexual intercourse with patients. Of this group, 80 percent had sexual intercourse with multiple patients.[219] It is estimated that the actual incidence of sexual exploitation of mentally ill patients is much higher.

That psychiatric professionals are aware of the problem within their own profession is borne out by a 1976 study which found that 50 percent of the psychiatrists in the sample knew of specified instances of sexual involvement between patient and therapist but that most had not reported these instances to an official body.[220]

A few therapists say that sexual involvement with a client is therapeutic. The fact is, however, that most clients get hurt, and the practice remains unethical and destructive. The long-term damage to

[216] *Id.*
[217] *Id.*
[218] Kardner, Fuller, & Mensh, *A Survey of Physicians' Attitudes and Practices Regarding Erotic and Nonerotic Contact with Patients*, 130 AM. J. PSYCHIATRY 1077-81 (1973).
[219] TASK FORCE ON SEXUAL EXPLOITATION BY COUNSELORS & THERAPISTS, MINN. DEPT. OF CORRECTIONS, LEG. REP. 1985, 7 (1985), *citing* a 1977 study by Holroyd and Brodsky. This study also found that within three months of therapy termination, 7.2% of males and 0.6% of females had intercourse with clients. In total, 17.1% of male and 2.0% of female psychologists who responded had some form of sexual contact with clients, either during therapy or within the following three months. *Id.*
[220] Grunebaum, Nadelson, & Macht, *Sexual Activity with the Psychiatrist: A District Branch Dilemma*. Paper presented at the 129th Annual Meeting of the Am. Psychiatric Ass'n, Miami, Fla. (May 10-14, 1976).

those who are sexually exploited is often extensive. The victims experience a high rate of psychiatric hospitalization, depression, shame, suicidal feelings and attempts, and other serious psychological consequences.[221] They experience decreased trust in other people. The sexual problems which they develop as a result of the abuse lead to broken relationships which in turn cause those close to the exploited patient and the abusing therapist to seek treatment.[222] The 1986 study does not address the question of the effect on the patient.

Benjamin Schultz, a clinical psychologist, lists two defenses commonly used by therapists who have become sexually involved with patients.[223] The first is that sex was part of the therapy. But Dr. Schultz concludes that: "[o]verwhelmingly, the courts have tended to view sex as acting out of the countertransference and hence negligent."[224] Countertransference is a common phenomenon in psychiatry. The patient begins to idealize the therapist and transfers love feelings to the therapist.[225] Dr. Schultz says: "[T]he picture of a self-sacrificing therapist bravely undergoing repeated doses of ungratifying sex solely for the patient's benefit is too much to swallow."[226]

The second line of defense is that the sexual relationship was separate from the therapeutic relationship and thus there is no malpractice or negligence. This has not been a very successful defense, since the courts are reluctant to accept such a compartmentalized view of human relationships. "A therapist attempting to prove the legitimacy of sexual relations between himself and a patient by establishing that two coterminous-in-time but utterly parallel relations existed has a difficult task."[227]

In the case of *Roy v. Hartogs*,[228] a New York psychiatrist was sued for using sexual intercourse as therapy over a period of 13 months, according to the plaintiff-patient. The court ruled that a valid cause of action for

[221] TASK FORCE, *supra* note 219, at 1.
[222] *Id.*
[223] B. SCHULTZ, LEGAL LIABILITY IN PSYCHOTHERAPY, 34-35 (1982).
[224] *Id.* at 35.
[225] Countertransference is "the conscious or unconscious emotional response of a psychotherapist or psychoanalyst to a patient." MOSBY'S MEDICAL & NURSING DICTIONARY 296 (2d ed. 1986).
[226] B. SCHULTZ, *supra* note 223, at 35.
[227] *Id. See also* Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1969); Anclote Minor Found. v. Wilkinson, 263 So. 2d 256 (Fla. 1972).
[228] 81 Misc. 2d 350, 366 N.Y.S.2d 297 (Cir. Ct. 1975), 85 Misc. 2d 891, 381 N.Y.S.2d 587 (N.Y. App. Term. 1976).

malpractice was brought by the plaintiff and Dr. Hartogs was found liable for malpractice.[229] Judge Markowitz wrote in his concurring opinion:

> While cultists expound theories of the beneficial effects of sexual psychotherapy, the fact remains that all eminent experts in the psychiatric field including the American Psychiatric Association abjure sexual contact between patient and therapist as harmful to the patient and deviant from accepted standards of treatment of the mentally disturbed.[230]

In summary, sexual involvement with a patient, whether part of the therapy or separate from the therapy, presents a high risk to both the patient and the therapist. The patient faces being unduly influenced by the psychiatric reality of transference and the therapist runs the risk of malpractice, negligence, and mental distress lawsuits, not to mention violation of professional ethics and loss of license.

In an effort to address these problems, the Minnesota Department of Corrections, as a part of its Program for Victims of Sexual Assault, established a Task Force on Sexual Exploitation by Counselors and Therapists.[231] In 1985, this group reported to a session of the Minnesota legislature on issues related to the problem, including creation of a statewide education plan and recommendations for criminal, civil, and regulatory changes. In addition to recommending a statewide education plan for both professionals and the public, the task force proposed a number of bills recommending changes to both the criminal and civil statutes.[232]

Under old Minnesota law, a complainant had to prove lack of consent. However, in many cases, consent is misconstrued because of the client's vulnerability, dependence, and trust in the therapist.[233] Additionally, abusive therapists often lead their victims to believe that the sexual contact is part of the beneficial treatment. Therefore, the task force

[229] 381 N.Y.S.2d 587, 590 (N.Y. App. Term. 1976).
[230] *Id.*
[231] In 1984, the Minnesota legislature mandated the Commissioner of Corrections to form the Task Force on Sexual Exploitation by Counselors and Therapists. The Task Force was made up of people from professional organizations, regulatory agencies, the legal community, mental health advocacy organizations, appropriate state agencies, and agencies and individuals involved in counseling and therapy services, as well as consumers. Approximately 60 professionals and members of the public worked directly on the project. The group reported to the 1985 legislature. *See* TASK FORCE, *supra* note 219, at 1.
[232] MINN. STAT. § 609.341 (1984), MINN. STAT. § 609.344 (1984), MINN. STAT. § 609.345 (1984), MINN. STAT. § 609.347 (1984).
[233] TASK FORCE, *supra* note 219, at 29.

recommended that the following changes be added to both the third and fourth degree criminal sexual conduct code:

1. Deception may not be used to accomplish sexual contact;
2. A psychotherapist may not engage in sexual contact with a current patient;
3. A psychotherapist may not engage in sexual contact with a former patient within six months of the last day of providing services; and,
4. Consent of the patient to sexual contact may not be used as a defense by the psychotherapist.[234]

Further, in cases of alleged therapist-client sexual exploitation, it is often a question of the patient's word against the psychotherapist's, and the issue of the patient's personal or medical history is brought in to discredit the patient's accusations. Therefore, the task force recommended the following additions to the criminal sexual conduct statute and to the rules of evidence promulgated by the Minnesota Supreme Court:

1. Evidence of the patient's personal or medical history [will] not be admissible except when the accused therapist [defends on grounds] that the patient has fabricated the story.
2. Evidence of the patient's personal or medical history must be admitted in the following manner:
   a. The accused therapist must request a hearing prior to the trial;
   b. The judge must determine whether the value of the patient's history outweighs its prejudicial value;
   c. The judge may allow only those parts of the patient's history to be admitted as evidence [which] expert testimony has determined to be directly related to the issue of fabrication;
   d. The judge must make a specific order detailing exactly what portion of the patient's history may be admitted as evidence and nothing else may be introduced; and
   e. Violation of the terms of the judge's order shall result in a mistrial, which will not prevent a retrial of the accused therapist.[235]

The task force also made recommendations designed to bring clarity and consistency to the civil statutes in this area. Because there are no statutory prohibitions of sexually exploitive behavior by counselors and therapists, the task force recommended that a cause of action for wrongful sexual contact between psychotherapists and patients be created and that employers be held liable for the same damages as therapists within their employ.[236]

[234] *Id.* at 30.
[235] *Id.* at 30-31.
[236] *Id.* at 32.

In most cases, there is no malpractice insurance coverage for sexual exploitation. A recent Minnesota Supreme Court decision[237] indicates that some malpractice insurance policies in Minnesota do not currently cover sexual contact by physicians.[238] Many policies specifically exclude such coverage. Consequently, not only is it difficult or impossible to recover damages but lawyers are reluctant to handle these cases. To solve this problem, the task force recommended that all professional liability insurance policies covering psychotherapists in Minnesota be required to cover sexual contact between therapist and patient.[239]

The statute of limitations presents a problem because of the latency of the damage to sexually exploited patients in many cases. The patient either does not recognize the victimization until years later, or the therapist manipulates or coerces the patient into not reporting the abuse. Because of this situation, the following recommendations concerning the statute of limitations were offered:

> That the statute of limitations be extended in cases of sexual exploitation by psychotherapists when the client is unable to complain for a period of time due to the effects of the sexual contact or due to any threats, instructions or statements from the sexually exploitive therapist.[240]

> Changes in the law are certainly a step in the right direction in an effort to alleviate the problem of sexual exploitation of the mentally ill. However, it is also necessary that mental health professionals and organizations become involved in the problem to the extent of not only disciplining their colleagues but conveying to the public their sense of impropriety of sexual contact between therapists and patients.[241]

CONCLUSION

The preceding discussion of the diverse goals of the actors involved in the treatment of the mentally ill indicates that there may be no final solution to the problem of conflicts. Collisions are, and will continue to be, inevitable.

When adequate resources and staff are not available because society

[237] Smith v. St. Paul Fire & Marine Ins. Co., 353 N.W.2d 130 (Minn. 1984).
[238] "We hold that the acts of sexual contact involved neither the providing nor withholding of professional services and, therefore, that the insurer's policy does not cover the damages sustained by plaintiffs." *Id.* at 132.
[239] TASK FORCE, *supra* note 219, at 32.
[240] *Id.* at 32.
[241] *Id.*

LAWYER

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Lawyer, shyster, ambulance chaser, Philadelphia lawyer, mouth piece, attorney, advocate, counselor. We've all heard the lawyer bashing. How do you tell the difference between a dead lawyer and dead skunk? Skid marks in front of the skunk.

"First thing we do, kill all the lawyers," Henry VI. No one loves a lawyer.

When I go to parties and people find out I'm a lawyer, the first question they always ask is "How can you defend somebody you know is guilty? You know I read about that case where the little girl was killed. How did that lawyer do it? How could he defend that scuzzeball. You know I don't think lawyers have any ethics. All they really care about is the money."

So what is it that lawyers do? Do they serve any role in society, other than the role of parasite upon parasite. Should we really "kill all our lawyers" and we'd have a better society? I want to talk about lawyers, but first I want to talk about doctors.

Ultimately, what is it that doctors do? The ideal doctor is a person who operates within the realm of human suffering. The doctor is interested in somehow relieving physical pain, mental pain, psychological pain so that the patient's life can be more fully lived. No properly trained doctor thinks that death can be

stopped. All of us are going to die. Of course life is a value; doctors try to extend it, to assist in its full enjoyment.

And a lawyer? A lawyer operates within the realm of conflict. Just as a doctor operates within the world of human suffering and understands that human suffering is inevitable because in the end we all die, so a lawyer works within the world of conflict and understands conflict is inevitable because human beings have been created with free will. We also live in a society - in a social structure in which we need each other. "No man is an island."

The problem is that we have free will and we live in a society, which makes conflict inevitable. Even though we love our spouses, our children, our friends, our significant others, we understand that even love doesn't conquer conflict. Conflict is inevitable because free willed human beings whether they love each other or not and who live in society and come close enough to one another-will inevitably have conflict.

Lawyers know that in a democracy there will always be conflict. Just as doctors know there will always be human suffering and death. What we lawyers try to do is to create ways to heal that conflict in a positive fashion. Doctors in the end cannot stop death. Lawyers in the end cannot stop conflict.

A lawyer acts as both a counselor at law and an advocate on behalf of individual human beings, groups of human beings, social structures, and corporate structures. First the lawyer tries to identify the issues and the questions from the perspective of his

or her own client. Even the rapist, murderer of a child, has due process rights in a democracy. He is presumed to be innocent and the people must prove him guilty. Next, the lawyer attempts to listen to, negotiate with, and come to resolution of the conflict with the representative of the other side. If this cannot be done, then the lawyer goes to court.

When I teach Trial Skills to my law students I explain that a trial is civilized warfare. What do I mean? It is someone trying to win, and in the process of winning, trying to beat the opponent. Of course, the civilized aspect of the trial is that the lawyers are bound by very strict, stringent sets of rules of evidence, rules of procedure and rules of professional ethics. But some lawyers are stepping away from these stringent rules. There are times when the Rambo tactics and profit motives of some lawyers overcome the function of healing conflict. This reality leads to problems and misunderstandings.

Lawyers, themselves, have begun to think about alternate ways to resolve disputes. Maybe the courthouse should also be a place for negotiation, mediation, conciliation, arbitration, fact finding and other creative mechanisms for dispute resolution that take into account the reality of conflict but also the need to avoid the warrior-like mechanisms that have been used so much in the profession of law.

Perhaps the lawyer jokes are a wake up call to my profession. If that's the case, I know the profession is hearing the alarm. Still, lawyers need to educate the public to

understand that conflict is not evil in and of itself. It is simply a reality of the human experience. And that the best way to deal with conflict is openly, honestly, humanly, with movement toward a positive healing not a negative resolution. Running away from conflict does not work. Eventually the conflict becomes even bigger. Human nature being what it is, there probably will always be a need for lawyers.

But lawyers must begin to recognize that the adversarial methodology of conflict resolution is hurting society and hurting them, too. The public needs healers of conflict -- not more warriors and generators of conflict.

You can kill all the lawyers if you want, but then brutalism will rule. Because it is lawyers who really understand that the rule of law is our best guardian if we hope to protect ideals like due process, liberty, equality, and justice.

FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the Minnesota Rules of Professional Conduct

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STATEMENT IN SUPPORT OF AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT PROPOSED BY THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

INTRODUCTION

The Minnesota Rules of Professional Conduct (MRPC) are a combination of broad general regulations and specific prohibitions. Attorney-client sexual relationships are presently regulated by broad general rules governing conflict of interest (Rule 1.7(b), MRPC) and the specific attorney misconduct rule prohibiting harassment on the basis of sex (Rule 8.4(g), MRPC). There is no explicit prohibition against commencing a consensual sexual relationship with a client.

After lengthy study the Lawyers Board and the Minnesota State Bar Association (MSBA) separately have concluded that an explicit rule regulating attorney-client sexual relations best served the public and the profession. The Lawyers Board concluded that a per se rule would best address the need for a bright line rule governing attorney-client sex and the public's interest in not subjecting the complaining client to further victimization during the disciplinary process.

ADOPTION OF RULE 1.8(k)

Need for Regulation of Attorney-Client Sex

The potential for harm to the integrity of the attorney-client relationship or to the client as an individual from sexual involvement between attorneys and their clients is widely recognized. In 1992 the ABA issued a formal opinion on attorney-client sexual relationships which concluded:

> It is apparent that a sexual relationship during the course of representation can seriously harm the client's interests. Therefore, the Committee concludes that because of the danger of impairment to the lawyer's representation associated with a sexual relationship between lawyer and client, the lawyer would be well advised to refrain from such a relationship. [1]

Attorneys who have a strong sexual interest in a client are not in an objective position to evaluate whether such a liaison will impair the professional relationship. As Professor Geoffrey Hazard remarked in the *National Law Journal,* "If the sexual relationship is emotionally serious, the lawyer cannot be dispassionate about the client's legal problems. If the relationship is not emotionally serious, the lawyer may be exploiting the client."[2]

Vulnerability exists whenever a client entrusts a matter of great importance to an attorney. Because the client invests the attorney with a great deal of power and authority, the attorney has a unique ability to influence the client and a corresponding responsibility to refrain from any action that would harm either the client or the client's legal matter. The power imbalance inherent in the professional relationship can and does affect the personal relationship as well. The confidence given to the attorney as a professional may extend to confidence in the attorney as a person. This phenomenon is called transference. Transference is the natural product of any professional relationship involving trust. Because of the transference phenomenon, a client may feel attracted to the attorney, engage in sexual relations and later feel betrayed and misused. Other professions in which transference is likely to occur, including doctors, psychiatrists, social workers and other mental health professionals already specifically prohibit sexual relations with clients or patients.[3] The potential for harm to the integrity of the attorney-client

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[1]American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 92-364, "Sexual Relations with Clients," July 6, 1992.

[2]Geoffrey Hazard, "Lawyer-Client Sex Relations Are Taboo," National Law Journal, April 15, 1991, p. 13.

[3]See Minn. Stat. § 147.091 (physicians and surgeons, osteopaths); Minn. Stat. § 148.01 et. seq. (psychotherapists); Minn. Stat. §148B.68 et. seq. (social work, marriage and family therapy, and mental health professionals).

relationship or to the client as an individual compels prohibition or strict regulation of an attorney's sexual involvement with his or her client.

Need for an Explicit Rule

Not all lawyers recognize the applicability of the general conflict of interest rule to a possible intimate relationship with a client. One lawyer, privately disciplined for attorney-client sex, told the Director's Office during its investigation of the client's complaint that he had "carefully checked the rules and case law" and did not believe his sexual relationship would violate the rule. In this particular case, the client did not allege her case was adversely affected by the sexual relationship. The client complained because she felt that her attorney had taken advantage of her by abusing the professional relationship for his own personal interests. The client claimed the professional relationship had been damaged because of the sexual relationship and that she felt emotionally injured or damaged as a person.

The incidence of attorney-client sexual relationships is difficult to document. In 1993 the *Memphis State University Law Review* published the results of a random nationwide study of attorney sexual involvement with clients.[4] Seven percent of the attorneys responding to the random anonymous survey acknowledged that they had had a sexual relationship with a client. Thirty-two percent knew of another attorney who had engaged in sexual relations with a client. The survey indicates that attorney-client sexual liaisons occur much more frequently than indicated by the incidence of disciplinary proceedings. While the discipline system does not keep records of the number of complaints in this area, a review of discipline records reveals that within the last five years, eight attorneys have been disciplined for conflict of interest involving sexual relations with clients.

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[4] Dan Murrell, J.L. Bernard, Lisa Coleman, Deborah O'Laughlin and Robert Gaia, "Loose Canons--A National Survey of Attorney-Client Sexual Involvement: Are There Ethical Concerns?" *Memphis State Law Review,* 23:483. The responses to this 1,500 attorney survey generated a profile generally consistent with that of the bar (p. 488. fn. 31).

An explicit rule provides greater client protection by making the limits on attorney-client sexual relations clear to the public and the Bar. Without an explicit prohibition, attorneys are left with the conflict of interest rules which require them to exercise independent or objective professional judgment at a time when most individuals would find it difficult to be objective. Attorneys may engage in sexual relations with clients only to discover later that their judgment was impaired. In that case both the attorneys and the clients lose. An explicit rule invites compliance provided it clearly identifies what is prohibited.

A Per Se Rule Best Protects the Public and Promotes Respect for the Profession

Per se prohibitions are appropriate where the potential for abuse is inherent in the attorney's actions. A per se prohibition of sexual relations with clients is necessary because the parties who are sexually attracted to each other cannot be expected to make dispassionate and objective decisions about whether their personal relationship will impair one of the party's judgment about the professional matter. Only in hindsight can the attorney and client determine the effect the intimate relationship had on the professional relationship and on the client's well-being. Even then, the effect upon the professional relationship can be very difficult to quantify objectively given the numerous judgments lawyers typically are required to make in any representation. A per se ban invites compliance because it states unequivocally what is prohibited.

While a per se prohibition can be criticized on an overbreadth basis, this Court has been willing to enact per se prohibitions in other instances where there exists potential for abuse of the attorney-client relationship for the benefit of the lawyer. Rule 1.8(c) bars an attorney from writing himself or herself or a close family member into his or her client's will. Rule 1.8(d) prohibits an attorney from negotiating literary or media rights while representing the client. In Rule 7.3 the Court adopted a per se ban as to in-person and telephone solicitation, recognizing the inherent possibility for undue influence or abuse of power. In each instance,

the Court has determined that the client protection and respect for the profession gained by prohibiting this conduct outweighed the burden imposed on attorneys.

Compliance with a per se ban will not unduly burden attorneys. Attorneys who desire to pursue sexual relationships with clients can refer the client to another lawyer or postpone the personal relationship until the representation is completed. On the other side of the balance, a per se ban better protects clients and promotes respect for the profession by explicitly affirming the importance of preventing possible abuse of a fiduciary relationship. A per se ban also promotes respect for the profession and the administration of justice by assuring clients that when they seek legal services, their professional relationship will not be influenced by sexual involvement. Individuals should be able to seek services of an attorney, just as they might a doctor or therapist, knowing that no matter how intimate the revelation, the attorney will not take sexual advantage of their trust.

The Lawyers Board proposal does not ban intimate relationships where the relationship began before the legal representation. In those instances, questions about the client's consent to the sexual relationship based upon transference or the power of the attorney-client relationship does not arise. Under some circumstances it might be unwise for an attorney to represent an intimate partner, just as it might be unwise to represent a family member. In those cases, however, a per se prohibition is not needed to protect the client and the general conflict of interest rules appear to be sufficient.

The Lawyers Board proposal also recognizes the difficulty in clearly identifying the client when applying the per se ban to attorneys for governmental entities and in-house corporate counsel. Lawyers who practice for governmental entities or as employees of large corporations typically are assigned to a client group, department or division by a supervising attorney. The person making decisions about the representation and overseeing the lawyer ordinarily is the one who supervises the attorney. The language of the MSBA proposal does not easily apply

to the practice circumstances for those groups of lawyers. For that reason, the Lawyers Board added language to subsection (2) clarifying the application of the rule to in-house corporate and governmental attorneys.

Under any rule, the well-being of the client and the integrity of the attorney-client relationship should be primary. Clients harmed by sexual relations with their attorney may find it difficult to complain because of the intensely personal nature of the conduct. If the rule governing attorney-client sex contains any element which focuses upon client vulnerability, the disciplinary process is likely to become still another ordeal and many injured clients may choose not to complain. Unlike the more nuanced, limited prohibition, a per se rule can be enforced by focusing on the attorney's conduct rather than the victim's.

MSBA Proposal

The MSBA proposal also explicitly regulates attorney-client sexual conduct, albeit by a more limited rule. The MSBA proposal strengthens the general conflict of interest rules by making the limitations on attorney-client sexual involvement clearer and by providing for a presumption that whenever a sexual relationship develops independent judgment is impaired.

The MSBA proposal prohibits sexual relations with a current client in two situations. In subsection (1)(A) sex is prohibited "in situations in which the client is emotionally or financially vulnerable." In subsection (1)(B) sex is prohibited "if the lawyer's or the client's independent judgment is likely to be impaired thereby." As to the latter subsection the proposal provides:

> In any disciplinary proceedings involving an alleged violation of these rules, a lawyer who engages in sexual relations with a client will be presumed to violate Rule 1.8(k) paragraph(A)(2) (sic). A lawyer who engages in sexual relations with a client shall have both the burden of production and the burden of persuasion that Rule 1.8(k) paragraph (A)(2) (sic) is not violated.

A drawback to this subsection (1)(A) of the proposal is that in an attempt to craft a rule which is not overbroad, the MSBA rule directs attention to the status of

the victim instead of the attorney's conduct. By limiting the prohibition to only "emotionally or financially vulnerable" clients, the MSBA proposal could potentially cause further victimization by promoting defenses during the lawyer discipline proceeding which focus upon whether the victim was in fact vulnerable. Such a proceeding could closely resemble that of criminal rape trials in which the victim's conduct is the primary focus. It is unclear why there is not a presumption and shift in the burden of persuasion when the client is financially or emotionally vulnerable.

A drawback to subsection (1)(B) of the proposal, and for any limited rule, is that the attorney wanting a sexual relationship with a client must exercise discretion about whether such a relationship is appropriate. The attorney must determine whether the client is vulnerable, whether the client's apparent willingness to engage in a sexual relationship may be the product of transference, whether his or her judgment about the client's legal matter may be affected and whether the client is able and will continue to be able to remain sufficiently objective and detached about the legal matter. As discussed earlier, under those circumstances attorneys are not in a good position to make an objective judgment. Another drawback is that attorneys attempting to rebut the presumption of impaired independent judgment in discipline proceedings will necessarily focus not only on the type of representation but also on the client's status including the client's continued ability to make objective, independent decisions. This defense, which may be the only contested issue, may well turn the focus of the disciplinary proceedings on the client's rather than the attorney's conduct.

CONCLUSION

The potential for harm to the integrity of the attorney-client relationship or to the client as an individual mandates either prohibition or strict regulation of sexual involvement with his or her client. A per se rule best serves the need for a rule

which clearly provides notice of what is prohibited and at the same time best protects the public by ensuring that complaining clients not be further victimized.

Dated: June 1, 1994.

GREGORY M. BISTRAM
LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD CHAIR

and

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FILE NO. C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the Minnesota Rules of Professional Conduct

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REQUEST TO MAKE ORAL PRESENTATION

The Lawyers Professional Responsibility Board request leave for Marcia A. Johnson, Director of the Office of Lawyers Professional Responsibility, and Gregory M. Bistram, its Chair, to address the Court concerning Lawyers Professional Responsibility Board and the Minnesota State Bar Association proposals to amend the Minnesota Rules of Professional Conduct.

Dated: June 2, 1994.

Respectfully submitted,

Marcia A. Johnson

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C8-84-1650

STATE OF MINNESOTA

IN SUPREME COURT

IN RE PROPOSED AMENDMENT

TO RULE 1.8(k) OF THE

RULES OF PROFESSIONAL CONDUCT

STATEMENT OF
KENNETH F. KIRWIN AND
PAUL J. MARINO

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INTRODUCTION

We are professors of law at William Mitchell College of Law, where we have taught the course in Professional Responsibility. We served on the subcommittee of the Minnesota State Bar Association (MSBA) Rules of Professional Conduct Committee that drafted the proposed provisions that in large part provided the bases for the MSBA and Lawyers Professional Responsibility Board (LPRB) Proposals now before this Court. The views expressed herein, however, are not made in any representative capacity. We offer them only for what we as individuals perceive to be in the public interest and because they may strike an appropriate compromise between the MSBA and LPRB proposals.

I. A PER SE PROHIBITION IS PREFERABLE TO A LIMITED PROHIBITION.

This matter comes before the Court in the wake of increased judicial and legislative attention to the problem of sexual conduct as an abuse of trust in the medical and mental-health professions and in the clergy, and as an abuse of disparity in economic power in the work place. As these concerns begin to focus on the lawyer-client relationship, it is vital that the public be given clear and unambiguous assurance that the various adverse consequences of a simultaneous sexual and professional relationship will not be tolerated. Only a per se prohibition can provide that assurance.

The lawyer and the client also will benefit from a "bright line" rule to guide them in a situation where the exercise of professional judgment may become clouded by the private emotions of the lawyer or the client.

A limited prohibition would inevitably burden the Court with difficult definitional and

threshold issues in a very sensitive area of human interactions. A limited prohibition would enable a respondent to re-victimize the client by litigating matters highly embarrassing and painful to the client. Knowing this, the client would be reluctant to complain against the lawyer.

The MSBA's proposed limited prohibition attempts to address these dangers by adding a "presumption" that a lawyer who has sexual relations with a client has violated the Rule. The proposal's "burden of production" and "burden of persuasion" would add a debilitating complexity to the message of the Rule as well as to the mechanics of its enforcement. They would constitute dubious new concepts in a sui generis disciplinary system that has long balanced the public interest and the lawyer's interest by requiring the respondent lawyer to "cooperate" with the investigation and requiring the Director of the Office of Professional Responsibility to prove a violation by clear and convincing evidence.

Moreover, this Court previously has not considered per se prohibitions within the Rules of Professional Conduct to be unjustifiably over-inclusive in situations where the potential for lawyer abuse is great. See, e.g., Rule 1.5(d) (contingent fee in domestic relations or criminal case); Rule 1.8(c) (preparing instrument giving lawyer gift from client); Rule 1.8(d) (negotiating agreement giving client's literary or media rights to lawyer); Rule 5.4(b) (forming partnership with non-lawyer for practice of law); Rule 7.2 (in-person solicitation for pecuniary gain).

Finally, a per se prohibition does not unduly intrude upon the lawyer's or client's privacy. It seeks only to assure the integrity of the lawyer-client relationship. The lawyer's and client's privacy interests may be pursued (and possibly enhanced) either by transferring

the representation to another lawyer or waiting until the representation is concluded.

A per se rule is the only approach that can offer appropriate and unambiguous assurance to the public, provide clear guidance to both the lawyer and the client, and assure a reasonably efficient and humane process of disciplinary enforcement.

II. WHICHEVER PROPOSAL THE COURT ADOPTS, THE PROHIBITION SHOULD NOT EXTEND TO SITUATIONS WHERE THE CLIENT IS AN ORGANIZATION.

After conducting law school and continuing legal education presentations on the subject of lawyer-client sex and after considerable study, discussion, and thinking about the matter, we have concluded that whichever proposal the Court adopts, the prohibition should not extend to situations where the client is an organization. Extending the prohibition to those situations exacerbates the proposed rules' potential over-inclusiveness.

It is clear that the lawyer cannot actually have a sexual relationship with an organization client, so the parallel to the live client paradigm breaks down at the outset. The complexity of determining which organizational employees should be considered the client for purposes of applying the attorney-client privilege or the Rule 4.2 restriction on communicating with an adverse party argues against transporting this difficult jurisprudence into the proposed Rule.

In recognition of the special circumstances of organizational representation, this Court has adopted Rule 1.13, which sets forth principles and procedures to guide the lawyer faced with potential conflicts arising out of differing loyalties to organizational employees and the organization itself. Current Rule 1.7(b), restricting representation that "may be materially

limited . . . by the lawyer's own interests," adequately addresses the situation where a lawyer's independent judgment is impaired by the lawyer's sexual relationship with an organizational client's employee. Together with the law's restrictions on sexual harassment in the workplace, these provisions provide considerable guidance and protection in situations of sexual conduct of an organization's lawyer. Moreover, many organizations (unlike individual clients) have adopted formal guidelines or informal customs and practices regarding personal relationships appropriate to the particular organizational setting that might be impaired by this Court's inclusion of organizational employees as "clients" for purposes of the proposed Rule.

Finally, excluding organizational representation would meet the concerns of those who point out that because of the frequently long-term duration of organizational representation, it is especially onerous to require lawyers and organizational employees who wish to engage in consensual sexual relationships to resolve the dilemma by awaiting the conclusion of the representation.

For these reasons, it seems prudent, at least for the time being, to exempt organizational representation from the operation of the proposed Rule. Therefore, we recommend that the Court substitute the following for Rule 1.8(k)(2)(B) of the MSBA Proposal and Rule 1.8(k)(2) of the LPRB Proposal:

> **This paragraph does not apply if the client is an organization.**

III. IN THE LPRB PROPOSAL, "BEFORE THE LAWYER-CLIENT RELATIONSHIP COMMENCED" SHOULD BE SUBSTITUTED FOR "WHEN THE LAWYER-CLIENT RELATIONSHIP COMMENCED OR AFTER IT ENDED."

At its September 1993 meeting, the MSBA Board of Governors added the words "or after it ended" to the MSBA Rules of Professional Conduct Committee's per se proposal (upon which the LPRB Proposal is largely based). The reason for adding these words is unclear. Unfortunately, these words would appear to insulate a lawyer from discipline for a sexual relationship commenced during a lawyer-client relationship as long as the lawyer could induce the client to keep the sexual relationship going for some amount of time after the lawyer-client relationship ended.

At the MSBA House of Delegates meeting in January 1994, MSBA President Roger Stageberg suggested that the words "or after it ended" should be deleted from the Rules of Professional Conduct Committee's per se proposal. This was not done because the House of Delegates instead approved the limited prohibition proposal.

Oregon Code of Professional Responsibility DR 5-110(A) specifies, "A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them before the current lawyer/client relationship commenced."

Accordingly, we recommend that the Court adopt the LPRB Proposal with the first sentence modified as follows to make it identical to the Oregon provision:

> **A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before ~~when~~ the lawyer-client relationship commenced ~~or after it ended~~.**[1]

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[1] If the Court desired to incorporate the Oregon language into the MSBA proposal, it could do so by amending Rule 1.8(k)(5) to read, "Rule 1.8(k) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the lawyer-client relationship commenced."

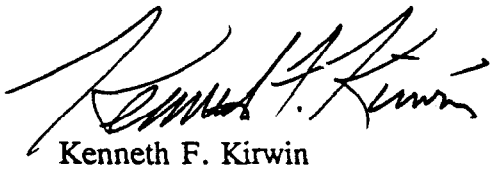
IV. ADOPTING A PER SE PROHIBITION BUT NOT EXTENDING IT TO SITUATIONS WHERE THE CLIENT IS AN ORGANIZATION WOULD BE AN APPROPRIATE COMPROMISE BETWEEN THE MSBA AND LPRB POSITIONS.

While each of the foregoing suggestions is offered on the basis of its own merits, adopting parts I and II in combination would strike an appropriate compromise between the positions of the Minnesota Women Lawyers and the MSBA, on the the one hand, and the LPRB on the other. Adopting a per se prohibition would respond to the LPRB's concern for a bright line rule that would promote efficient enforcement and avoid re-victimizing clients. Excluding situations where the client is an organization would go a long way toward addressing the Minnesota Women Lawyers and MSBA's concern about potential over-inclusiveness.

CONCLUSION

For the foregoing reasons, we respectfully recommend that the Court adopt the LPRB Proposal with the changes suggested in parts II and III of this Statement. If the Court adopts the MSBA Proposal, we recommend that the Court make the change suggested in part II of this Statement.

Respectfully submitted,



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Dated: June 1, 1994